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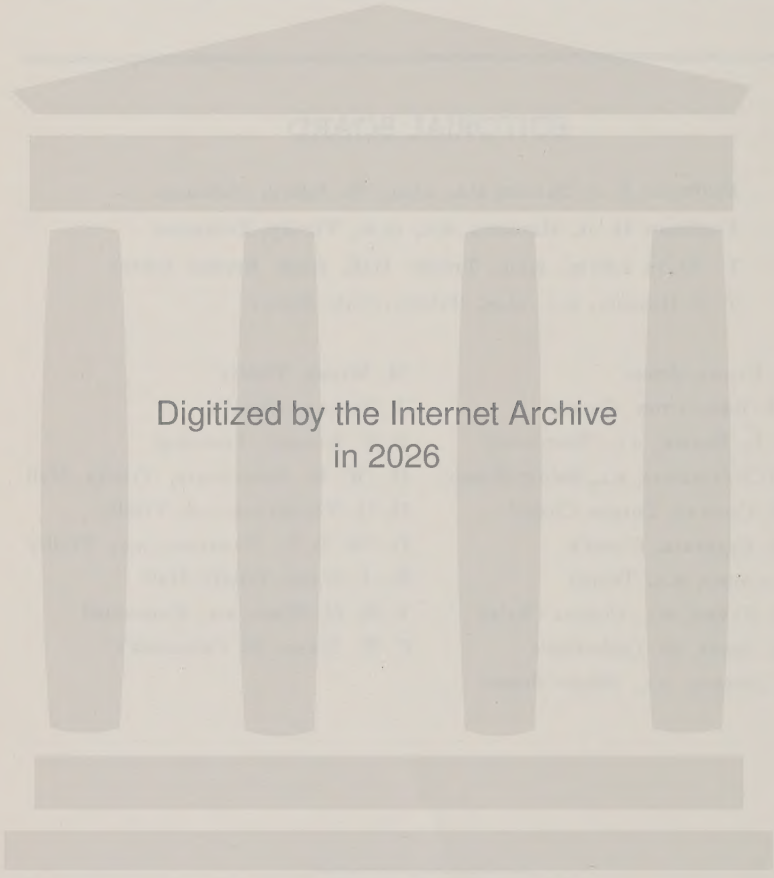

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TRANSFER OF CHOSES IN POSSESSION BETWEEN MEMBERS OF A COMMON HOUSEHOLD

J. W. A. THORNELY

THE case of *Hislop* v. *Hislop* [1] is a reminder of the special difficulties that may beset a person who attempts to transfer some chose in possession to another person resident in the same household. These difficulties occur where the chattel or collection of chattels in question, which due to size or quantity are not readily susceptible of actual manual delivery, have been used and enjoyed by both grantor and grantee together before the transfer of title and will continue so to be used thereafter. To a bystander the chattels appear to remain in the same situation after as before the transaction, yet ownership or possession or both may have passed with important consequences.

The effectiveness of such transactions is perhaps most frequently challenged where the trustee in bankruptcy or an execution creditor of the grantor seeks to claim the chattels under the provisions of the Bills of Sale Acts, 1878 and 1882. These Acts may render void a document on which the title of the grantee depends if the grantor retains, or appears to retain, possession of the chattels. Transfers of chattels in such circumstances as those described in the first paragraph are peculiarly vulnerable to the operation of these statutes, since the change of possession is not apparent, as it would be where a grantee removes the articles to his own separate premises. It is therefore proposed to consider the operation of these Acts in some detail later in this article. Similar questions may indeed arise in connection with other statutory provisions,[2] but these will only be considered incidentally.

Most of the relevant cases have been concerned with attempts to make outright transfers of chattels by way of sale or gift, rather than by the creation of security for loans by mortgage or pledge, since, as one would expect, in a common household most loans are made without security. As is common with gratuitous transactions, greater difficulties tend to arise with gifts than with sales. Whereas the title to chattels may pass by virtue of a contract of

1 [1950] W.N. 124; not reported elsewhere.

2 *e.g.*, the rather similar s. 10 of the Married Women's Property Act, 1882—see *French* v. *Gething* [1922] 1 K.B. 236; or the "reputed ownership" clause in s. 38 (*c*) of the Bankruptcy Act, 1914; or s. 172 of the Law of Property Act, 1925, re settlements in fraud of creditors.

sale irrespective of delivery,[3] in the case of gift the title can only pass by means of a deed of gift or a sufficient delivery.[4] It is only natural that a deed of gift should be used infrequently by persons ignorant of the technicalities of the law who wish to carry out what seems to them a very simple transaction. Thus in the case of gifts the vital question is usually whether there has been a delivery of possession, actual or constructive, sufficient to pass the title. But even in cases of gifts by deed, sales or loans upon security, where this difficulty does not occur, the presence of delivery may preserve the effectiveness of some document employed in the transaction which would otherwise be avoided by the Bills of Sale Acts.

It is therefore proposed, first, to discuss generally the question of constructive delivery, with particular reference to the effect of a purported oral or written gift of chattels already used by both donor and donee together; second, to examine in outline the provisions, objects and operation of the Bills of Sale Acts; third, to consider the application of those Acts to transfers of chattels within a common household; fourth, to consider whether the nature of the relationship existing between the particular members of the household concerned may affect the result of such transactions or whether it is irrelevant.

1. *Transfer of possession by delivery*

There is considerable difficulty in reconciling the decisions in criminal cases on possession with those in civil cases, no doubt because the criminal law has been prepared to sacrifice principle to expediency in making punishable various forms of undesirable conduct.[5] Since this article is concerned with the voluntary transfer of chattels, attention will be directed only to the rules of the civil law.

For a person to enjoy possession in law he requires to have both a certain *corpus* and *animus*. The *corpus* of possession involves both a relationship to the thing possessed and a relationship to other persons generally. The relationship to the thing possessed appears to be satisfied if the possessor has such physical control over it as the nature of the thing and the circumstances permit.[6] The relationship to other persons appears to be satisfied, for the purpose of initially acquiring possession, by an ability to exclude

[3] Sale of Goods Act, 1893, ss. 17, 18.
[4] *Cochrane* v. *Moore* (1890) 25 Q.B.D. 57.
[5] See the remarks of Sellers J. on this point in *Du Jardin* v. *Beadman Bros., Ltd.* [1952] 2 All E.R. 160, at p. 163, adopting the views of J. W. C. Turner in *Russell on Crime*, 10th ed., Vol. 2, at pp. 1087, 1089, 1102.
[6] *The Tubantia* [1924] P. 78.

others at the very moment of acquisition; but as regards retaining possession already acquired, it seems that the law will presume such ability to exclude others until the possessor disposes of the thing or until another actually deprives him of control.[7] The *animus* required is an intention to exclude others from interfering with the possessor's control, though it is not necessary that the possessor should intend to hold the thing as owner, or even for his own use or advantage—thus a bailee has possession though he be willing to surrender the thing to the bailor on request and even though the bailee derives no advantage from the bailment.

When possession in fact is in doubt as between two or more claimants, the law will attribute possession to that one who can show the better right to possess. "Possession follows title."[8] This rule was already established, as regards land, in Littleton's day.[9] It has subsequently been settled that it also applies to chattels.[10]

Possession may be voluntarily transferred from one person to another by delivery,[11] which may be actual or constructive. There is no difficulty where A makes an actual manual delivery of some chattel to B, who resides with him, for B's own personal and exclusive use, since B will no doubt place it with his other belongings in his own drawer or cupboard and the transfer of possession will be apparent. But if A wishes to transfer to B some bulky article or a collection of articles, *e.g.*, furniture, which A now owns though B has been sharing their use with A, it is likely that B, having no other premises of his own, will leave the articles exactly where they have always stood and will permit A to continue to use and enjoy them as B had previously been allowed to do. In such circumstances it would be fanciful to expect that A will solemnly pick up and hand to B each individual item included in the transfer.

An actual manual delivery of one article as representing all will suffice to pass possession of them all. In *Re Harcourt*[12] H, by deed, gave chattels listed in a schedule thereto to her niece, who resided with her. On discovering that the schedule did not contain all the chattels she had intended to give, she later executed a

[7] Holmes, *The Common Law*, Lect. VI; Pollock and Wright, *Possession in the Common Law*, Pt. I; Paton, *Jurisprudence*, 2nd ed., Chap. 22. This view seems preferable to the test of improbability of interference which appears to be over-emphasised in Salmond, *Jurisprudence*, 10th ed., 294–5, and in Keeton, *Elementary Principles of Jurisprudence*, 2nd ed., 182, 184.

[8] *Pollock and Wright*, 24.

[9] Littleton, *Tenures*, s. 701; *per* Maule J. in *Jones* v. *Chapman* (1847) 2 Ex. at 821, approved in *Lows* v. *Telford* (1876) 1 App.Cas. at 426.

[10] *Smith* v. *Smith* (1733) 2 Str. 955; *Gough* v. *Everard* (1863) 2 H. & C. 1, *per* Martin B., at p. 9; *Ramsay* v. *Margrett* [1894] 2 Q.B. 18; *French* v. *Gething* [1922] 1 K.B. 236.

[11] See definition of delivery in s. 62, Sale of Goods Act, 1893.

[12] (1883) 31 W.R. 578.

memorandum (not under seal) directing that a silver bowl, a Crown Derby dessert service and some old Chelsea dishes should be considered to form part of the schedule to the deed of gift and, simultaneously, she delivered one dish to her niece in the name of the whole. The china concerned continued to be used in the household as before. In holding that there was an effective gift, Pollock C.B. said [13]: "I may say that to my mind the suggestion that Mrs. Harcourt should hand over every plate to her niece is in itself an absurdity." This case was doubted in *Cochrane* v. *Moore*,[14] but that was because Pollock C.B. had accepted the principle that an effective gift could be made by a clear expression of the donor's intention to give and of the donee's intention to receive, without either a deed or a delivery, and not because the part-delivery to the niece was ineffective. A similar decision concerning part-delivery was reached in *Lock* v. *Heath* [15] two years after *Cochrane* v. *Moore* had established beyond doubt the need for either a deed or a delivery for an effective gift.

Where no chattel is itself physically transferred there may nevertheless be a constructive delivery sufficient to pass ownership to the grantee. Thus words of gift uttered by the owner, and words of acceptance by the donee who is already holding the chattels concerned as bailee for him, change the character of the donee's possession so as to constitute a constructive delivery which will pass the title.[16] The same is true where the donee merely had custody of the chattels as the donor's servant; the custody becomes possession and the title passes.[17]

Where, on a sale, the seller agrees to retain possession on behalf of the buyer and no longer in his former capacity as owner, there is a good delivery amounting to an "actual receipt" within section 4 of the Sale of Goods Act, 1893.[18] But where there is no such agreement, the mere fact that the goods remain in the seller's hands after sale does not justify the inference that he holds the goods as bailee for the buyer; certainly not where he is unpaid, as

[13] At p. 580, col. 2.

[14] (1890) 25 Q.B.D. 57.

[15] (1892) 8 T.L.R. 295 (oral gift of furniture listed in inventory annexed to a deed poll, which was ready prepared but only executed later the same day, declaring that the gift had been made. One chair delivered in name of the whole at time of oral gift. Held to be valid gift; a mere inventory was not a bill of sale requiring registration). In sales a delivery of part may constitute delivery of the whole if so intended: *per* Lord Blackburn in *Kemp* v. *Falck* (1882) 7 App.Cas. 573, at p. 586.

[16] *Alderson* v. *Peel* (1891) 7 T.L.R. 418; *Re Stoneham* [1919] 1 Ch. 149.

[17] *Winter* v. *Winter* (1861) 4 L.T. 639.

[18] *Elmore* v. *Stone* (1809) 1 Taunt. 458; *Bartram* v. *Payne* (1827) 3 C. & P. 175; *Marvin* v. *Wallis* (1856) 6 El. & Bl. 726; *Castle* v. *Sworder* (1861) 6 H. & N. 828. The section replaces s. 17 of the Statute of Frauds, 1677.

his lien on the goods would explain the retention [19]; nor where the price is paid, otherwise the power of a seller who remains in possession to resell the goods and to pass a good title to the second buyer under section 25 (1) of that Act would be limited to unpaid sellers, which would be inconsistent with the cases decided under that section.[20] In such cases, therefore, the seller simply remains in possession as a seller who has not yet delivered the goods. On the other hand, if the seller and buyer live in the same household, the possession of the goods sold, if they have been used by them both before the sale, will be in doubt and therefore the rule that possession follows title will apply and will cause possession to vest in the buyer.[21]

A gift by deed, like a sale, passes title irrespective of whether there is delivery or not. If the gift be to another member of the household who shared their use, possession, being in doubt, will follow the title as in the case of sale.[22] But if the gift is to an outsider it has been suggested that the donor impliedly becomes a bailee at will for him until he takes possession.[23] Perhaps this difference from the result of a sale in similar circumstances is justifiable on the ground that a gift by deed is a unilateral transaction which vests the title in the donee, whether he is aware of the gift or not, unless and until he disclaims the gift.[24] Thus until he communicates the gift to the donee the donor must anticipate retention of possession and there may be some ground for regarding him as constituting himself a bailee; but this appears rather artificial, particularly where the donee was aware of the gift when it was made.

If the gift is not by deed title can only pass by delivery, actual or constructive.[25] Though there is no reported case which decides that if a donor agrees to hold the chattels as bailee for the donee there is a sufficient delivery to pass the title, there seems every reason for assuming this to be the case by analogy with sale. Where there is no such clear agreement, but merely a purported gift made orally or in writing, this appears to have the effect of a licence to the donee to come and take the chattels from the donor's

19 Sale of Goods Act, 1893, s. 39 (1) (*a*).

20 Or under the almost identical wording of s. 8, Factors Act, 1889. The cases are: *Staffs. Motor Guarantee, Ltd.* v. *British Wagon Co., Ltd.* [1934] 2 K.B. 305; *Ahrens, Ltd.* v. *George Cohen, Sons & Co., Ltd.* (1934) 50 T.L.R. 411; *Union Transport Finance, Ltd.* v. *Ballardie* [1937] 1 K.B. 510; *Old's Discount Co.* v. *Krett & Krett* [1940] 2 K.B. 117.

21 *Ramsay* v. *Margrett*; see note 10, *supra*.

22 *French* v. *Gething* [1922] 1 K.B. 236.

23 Sir F. Pollock in 6 L.Q.R. 446, at p. 449, where his concern is mainly with rights against third parties.

24 *Standing* v. *Bowring* (1886) 31 Ch.D. 282, at p. 290.

25 *Cochrane* v. *Moore* (1890) 25 Q.B.D. 57.

premises.[26] Being gratuitous, the licence remains revocable until the donee actually takes possession, at which moment title will also pass. It seems a misuse of terminology to say that the donor bails the chattels to himself as a bailee at will for the donee, since the bailment is terminable at the donor's will and the donee cannot insist on an actual delivery if the donor changes his mind.[27] This is very different from the gift by deed mentioned in the previous paragraph, where the title has already vested in the donee and the bailment, if there be one at all, is terminable at the will of the donee, not of the donor-bailor. In the case of the oral or written gift the only difference between the donor's position and that of an absolute owner seems to be that he has imposed upon himself a moral, but not a legal, obligation to perfect the gift by allowing the donee to take the thing concerned. Such a purported oral or written gift to an outsider therefore passes no title unless and until the donee takes actual possession from the donor or the donor clearly attorns bailee to the donee.

In cases where the delivery of a key has been held to be an effective delivery of chattels in a locked room, the reason is that the key gave effective means of access and control to the transferee. Thus in *Wrightson* v. *McArthur*,[28] where the defendants locked up some goods in two rooms on their own premises and gave the keys to the plaintiffs as a method of pledging the goods to them, Rowlatt J. held that possession of the goods had passed to the plaintiffs with the keys; the transaction had the effect of giving them an irrevocable licence (as there was consideration) to enter the premises in order to use the keys and to remove the goods if they saw fit. They had the means of control, which the defendants no longer enjoyed. Even where the pledgor has access to the key for limited purposes the result is the same if his intention was that the pledgee should have the effective control.[29] If there is no consideration for the delivery of the key then the licence to get at the goods would be a revocable one and the donor might still lawfully bar access to the door concerned, so that there would be no real delivery of effective means of control.

But if the donor and donee live in the same household, and the use of the chattels given has already been shared by them both,

[26] 6 L.Q.R. 446. The maxim that where possession is in doubt it follows title cannot help the donee, since in such a case title can only pass by a delivery of possession: *Hislop* v. *Hislop* [1950] W.N. 124.

[27] I am indebted to Mr. T. C. Thomas for this point and for other helpful suggestions.

[28] [1921] 2 K.B. 807. Rowlatt J., it is submitted rightly, considered such a delivery to be actual rather than constructive.

[29] *Hilton* v. *Tucker* (1888) 39 Ch.D. 669, where the goods were locked up on a third party's premises.

the position is more interesting. Words of gift, written or spoken, would constitute a revocable licence to take the chattels. But here at the time of the gift the donee has already the means of access to the chattels without the necessity for the delivery of a key. If the intention of the donor was really to pass ownership and possession, why may it not be said that the donee takes possession of them constructively at the moment of gift without actually laying hands upon them, since they will remain where they are? There can be little doubt that if he were to lift each item and put it back in its place with some appropriate words to show that he was taking possession there would be an effective delivery and title would pass. Will not mere words of acceptance suffice without manipulation? It is submitted that provided there is a clear intention on the donor's part to pass possession and title, as opposed to the mere right to use, this should be so. This would be consistent with the requirements of possession in English law as stated at the beginning of this section. At the time of the oral or written gift the donee has such control of the thing as the circumstances permit, is able to exclude all others from interfering with such control at the moment of transfer, and intends to exclude all others, though he is willing to permit the donor to continue to use it just as the donor has formerly permitted the donee to use it. Had the donee not been living in the same household with ready access to the thing, then the elements of control and ability to exclude others would have been lacking. That is why there cannot be an effective delivery to an outsider by mere words of gift without attornment.

It is submitted that on the cases prior to *Hislop* v. *Hislop* [30] it was open to a court to hold that there can be an effective transfer without manual delivery or attornment in such circumstances provided there is clear evidence of the donor's intention to pass possession and title as opposed to the mere right of user, and of the donee's intention to accept. In some of these cases, which must now be examined, there was held to be no delivery and therefore no gift, though sometimes the decision seems to have turned on the evidence available. In none was it held that nothing short of actual delivery or attornment would suffice for gifts between persons living together. Indeed, in *Kilpin* v. *Ratley* [31] there is a decision to the contrary. There R., being seriously indebted, by a deed duly registered, assigned all his property including the furniture in his matrimonial home to his father-in-law P., who undertook to pay R.'s creditors 6s. in the £. The

[30] [1950] W.N. 124.
[31] [1892] 1 Q.B. 582.

furniture remained in R.'s house. Later P. came to the house and, in the presence of his daughter, R.'s wife, pointed to the furniture and said "I give you this furniture: it will be something for you." P. then departed, leaving Mrs. R. in the house. Both Hawkins and Wills JJ. found that up to the moment of the gift R. was still in possession as bailee for P., who had become owner by the deed of assignment. Both judges considered that there was a sufficient delivery to vest possession, and therefore title, in Mrs. R., though there was no evidence that R. knew of or consented to the transaction, so that he cannot have attorned bailee to his wife. Wills J. said[32]: "Purser meant that the furniture should be thenceforth in the possession of the claimant; and it seems to me that she was in possession of it under such circumstances as to afford sufficient indicia of her property in the furniture. It cannot have been necessary to move the furniture out of the house. As the claimant was living in the house, there was, in my opinion, abundant evidence to support the learned county court judge's finding.[33] I think that the gift was accompanied by a delivery of possession sufficient to satisfy all requirements, and that it was not necessary that Purser should go through the mere formality of handling the furniture in order to complete the gift." The two judges considered that their decision was more than covered by the cases of *Winter* v. *Winter*[34] and *Alderson* v. *Peel*,[35] yet Mrs. R., prior to her father's gift, had neither sole custody nor possession but merely the privilege of using the chattels together with her husband. It was therefore a case of a change in the character of her right to use the furniture, not of her custody or possession, and thus seems to go further than either of the two cases relied on. If an owner not resident in the common household can in this way transfer possession between members of that household by mere words of gift, surely R. himself could have made an equally effective transfer had he happened to be the owner at the time and to have uttered the same words.

In *Ward* v. *Turner*[36] Lord Hardwicke L.C. refused to find a delivery sufficient for a *donatio mortis causa* on the bare ground that the donee lived in the same household, both because the donee was the donor's servant and had only been given custody

[32] At p. 586.

[33] The county court judge held that the property had passed to P. by the deed and there was a valid gift by him to Mrs. R. with such delivery and change of possession of the furniture as was reasonably practicable in the circumstances.

[34] (1861) 4 L.T. 639.

[35] (1891) 7 T.L.R. 418.

[36] (1752) 2 Ves.Sen. 431, at p. 438.

for the donor, not possession for himself, and because such a gift of an unspecified residue of chattels was tantamount to a nuncupative will. Similarly, in *Youngs* v. *Youngs*,[37] it was held that there was sufficient evidence to justify the county court judge's finding that the owner, in selling his furniture to his housekeeper, had never intended to give her possession. The transfer was simply a method of raising money to enable him to pay his creditors. These two cases thus deny an effective delivery on the evidence available and particularly because of the relationship of master and servant existing between the parties.

In *Irons* v. *Smallpiece* [38] the plaintiff sued to recover two colts which he alleged that his father had given him a year before the latter's death, the colts remaining in the father's possession until his death. Although six months before his death the father agreed to supply hay for the colts at a fixed price, as the son could not afford the market price, he did not in fact supply any until three or four days before his death, and it appears that the son must have supplied and paid for hay for almost the whole year. The gift was held to be ineffective as there was no change in the character of the father's possession. Had he supplied hay for the whole of the latter six months as agreed, the court might have been ready to regard him as bailee for his son. The decision seems curious. Why was not the father's later agreement to supply hay at a special price an acknowledgment that he held for his son, at least from that moment ? Unfortunately, as in many of these cases, the report does not mention the circumstances of the gift itself. There is no evidence whether the son resided with his father and had been permitted to use the colts prior to the gift; if not, the case may be distinguished from the type of case we are discussing. In *Bourne* v. *Fosbrook* [39] the jury found that there had been an oral gift, but no delivery, of a piano to the plaintiff, a child who had been taken into the donor's household and treated like an adopted daughter. Again the circumstances of the gift are not given and as the donor was dead the jury's decision that there was no delivery may have been due to lack of evidence of his real intentions at the time of the gift. Perhaps the fact that the donee was a child may have affected the view taken of the donor's actions and intentions.[40]

[37] [1940] 1 K.B. 760.

[38] (1819) 2 B. & Ald. 551.

[39] (1865) 18 C.B.(N.S.) 515. For a county court decision to the opposite effect in similar circumstances *cf. Gollop* v. *Brown* (1952) 102 L.J. 360.

[40] See *Jones* v. *Lock* (1865) L.R. 1 Ch.App. 25, where words of gift accompanied by delivery of a cheque by a father to his nine months old son were held not to constitute a gift nor a valid declaration of trust.

In gifts between husband and wife before 1883 there was the special difficulty that the wife could not own chattels unless they were conveyed to her separate use. Thus even an actual delivery from the husband to his wife could not possibly vest the title in her and it was ultimately established that such an attempt could not be construed as a declaration of trust so as to make the gift effective.[41] That difficulty was removed by the Married Women's Property Act, 1882, yet the general difficulty of the common residence remained and was considered by the Court of Appeal in *Bashall* v. *Bashall*.[42] There a wife sued to recover a pony and trap, a saddle and a dog alleged to have been given to her by her husband during marriage. In reversing the judgment of Collins J., Lord Esher stressed the need for delivery where the gift was not by deed, but admitted the difficulty of making an effective delivery of such articles, as opposed to jewellery, etc., in such circumstances. The crux of the matter was whether there was an intention to pass title or only to give a right to use, and that was a question of evidence. "In an action by the wife it was necessary for her to show that the husband had done that which amounted to a delivery. If the facts proved were equally consistent with the idea that he intended to deliver the thing to the wife so as to be her property, and with the idea that he intended to keep it as his own property, then the wife failed to make out her case." Lord Esher found that there was no sufficient evidence of delivery in the particular circumstances. The case suggests that if an act or clear words on the donor's part showing an intention to pass the property can be proved, the gift may be effective without a manual delivery and in spite of the continued use of the chattels by both the parties, provided the donor's user is not inconsistent with a change in ownership.[43]

In *Hislop* v. *Hislop*[44] the cases quoted above do not appear to have been cited. H. executed a document not under seal stating that he had that day handed certain furniture listed in an attached inventory to his mistress, who was living with him in what had been his matrimonial home after his wife had left him due to his adultery. The furniture remained in the house and was used by them both. Three years later H.'s wife secured her divorce and

[41] *Re Breton's Estate* (1881) 17 Ch.D. 416, applying *Milroy* v. *Lord* (1862) 4 De G.F. & J. 274, and not following *Grant* v. *Grant* (1865) 34 L.J.Ch. 641.

[42] (1894) 11 T.L.R. 152.

[43] Halsbury, *Laws of England*, 2nd ed., Vol. 16, p. 662, para. 1056, and especially note (*h*). For a case where the use made of the chattels was inconsistent with a transfer of ownership, see *Valier* v. *Wright and Bull* (1917) 33 T.L.R. 366 (after oral gift of car to his wife, husband continued to use it constantly in his business of giving driving lessons).

[44] [1950] W.N. 124.

he later married his mistress. The first wife then sought to levy execution on the furniture for arrears of maintenance, but the second wife claimed that the chattels were hers. The first wife succeeded, since Sir Raymond Evershed M.R., delivering the judgment of the Court of Appeal, held that the document was vitiated by the Bills of Sale Act, 1878; but on the question of delivery, which would have ousted the operation of the Act, the very sparse report merely states that the Master of the Rolls said "Here there had been no delivery." The statement in the document that H. had "handed" the furniture to the donee must therefore have been inaccurate, and the question of a possible constructive delivery does not seem to have been considered, though the report is extremely brief. As the document was attested by a witness there was clear evidence of an intention to pass title. The question was expressly left open whether the subsequent marriage of the donor and donee might not have cured the lack of delivery in some way, so that even this decision, which seems to run counter to the submission made above, appears to envisage the possibility of a transfer of possession without delivery in certain circumstances within a common household.

As persons living together in the same establishment are unlikely to employ deeds whenever they wish to make such gifts to each other, and as it is unreasonable to expect them to make a manual delivery of collections of chattels which are to remain where they have always been, whereas an external donee would naturally remove them to his own premises, it seems desirable that an oral or written gift of chattels in circumstances clearly showing an intention to pass the title should be treated as an effective constructive delivery which will achieve this object. The peculiar vulnerability of such transactions to the provisions of the Bills of Sale Acts, now to be discussed, is a further argument in favour of such a view. The cases considered above do not appear to make this result impossible even now.[45]

2. *The Bills of Sale Acts* [46]

Before discussing the application of the Bills of Sale Acts to transactions in a common household it is proposed to make certain

[45] For a case where the court was prepared to find a constructive delivery in circumstances where a manual delivery was difficult or impossible, see *Rawlinson* v. *Mort* (1905) 21 T.L.R. 774 (church organ). See also the county court case of *Gollop* v. *Brown* (1952) 102 L.J. 360 (oral gift of piano by parent to child, publicly announced, followed by piano lessons; piano remained in parent's house for 20 years; held to be a constructive delivery).

[46] Bills of Sale Act, 1878; Bills of Sale Act (1878) Amendment Act, 1882, as amended by Bills of Sale Acts, 1890 and 1891. On the subject generally, see Waldock, *Law of Mortgages*, 2nd ed., Chap. V.

comments upon their provisions and operation, and it is thought that a summary of their major provisions may be of assistance to the reader.

The expression "bill of sale" is defined [47] to include a variety of documents effecting a transfer of or a charge on "personal chattels," which, so far as is relevant to this article, are "goods, furniture, and other articles capable of complete transfer by delivery." [47] These documents may be classified as either absolute bills of sale or mortgage bills of sale.

Absolute bills of sale, which are governed solely by the 1878 Act, are documents within the definition which make an outright transfer of the title by sale or gift, and whereby the grantee has power to seize or take possession of any personal chattels comprised in or made subject to bills of sale.[48] As there can be no such power to *take* possession in a transaction where possession has been vested in the grantee before or at the same time as the document becomes operative, a document relating to such a transaction cannot be an absolute bill of sale within the Act.

Assuming that a document is an absolute bill of sale as defined above, it must be attested by a solicitor and must state that he explained its effect to the grantor before its execution [49]; it must state the consideration for which it was given, must be registered within seven days of its execution,[50] and thereafter registration must be renewed every five years.[51] Failure to comply with any of these provisions makes the bill void only as against the grantor's trustee in bankruptcy, or against a trustee of an assignment for the benefit of his creditors generally, or against an execution creditor, in respect of the title to, or the right to possession of, such of the chattels comprised therein as were in the grantor's possession or apparent possession [52] both at the time of the bankruptcy petition or assignment or levy of execution *and* after the expiry of seven days from the making of the bill. Thus an absolute bill of sale invalidated by the Act remains effective between the grantor and grantee. The Act may be evaded by the grantee obtaining possession before or at the time of the execution of the document,[53] or within the seven days next following during which registration is

[47] Bills of Sale Act, 1878, s. 4. The definition of a bill of sale is too lengthy for quotation here. It is also adopted by s. 3 of the 1882 Act, but excluding bills "given otherwise than by way of security for the payment of money." "Personal chattels" are also defined in s. 4.

[48] s. 3.

[49] s. 10 (1).

[50] s. 8.

[51] s. 11.

[52] Defined, s. 4.

[53] *French* v. *Gething* [1922] 1 K.B. 236.

not essential, or even at some later time before the bankruptcy, the assignment on behalf of the creditors, or the levying of execution.

Mortgage bills of sale are governed by the 1882 Act (as modified in 1890 and 1891) and by such parts of the 1878 Act as are not inconsistent with the later Act. They are documents within the definition [47] which effect a transfer of title to chattels subject to a right of redemption, or which effect a charge on chattels or authorise their seizure as a security for the payment of money, as opposed to those which effect an unconditional transfer of title. The provisions of the two Acts read together are much more complicated than those of the 1878 Act alone. Attestation (not necessarily by a solicitor), statement of the consideration, registration within seven days and renewal thereof are all still required.[54] Failure to comply with any of these provisions makes the document void as a security in respect of the chattels, though the mortgagee may still sue on the personal covenants.[55] Further, the bill will be void as against third parties, but not as between grantor and grantee, in respect of any chattels not specifically described in the inventory which must be annexed thereto,[56] or in respect of any goods specifically described of which the grantor was not the true owner at the time of its execution.[57] A mortgage bill given for a consideration under £30,[58] or which fails to accord substantially with the statutory form prescribed,[59] is totally void in so far as it relates to "personal chattels," even as against the grantor. In all these events the bill of sale becomes void *ab initio* as against third parties, and the grantee thus cannot defeat them by obtaining possession of the chattels at any time after the execution of the document.[60]

The object of the 1878 Act was to protect the creditors of a man who had secretly parted with the title to chattels whilst retaining possession or apparent possession of them, his false appearance of ownership thus deceiving people into giving him credit that they would not otherwise have given.[61] Whilst this object applies to both absolute and mortgage bills of sale, the 1882 Act, in prescribing a statutory form for the latter, had the

[54] Bills of Sale Act, 1882, ss. 8, 10.
[55] *Heseltine* v. *Simmons* [1892] 2 Q.B. 547.
[56] 1882 Act, s. 4. *Waldock*, 105.
[57] s. 5. *Waldock*, 107.
[58] s. 12.
[59] s. 9.
[60] *Newlove* v. *Shrewsbury* (1888) 21 Q.B.D. 41, at pp. 44–5, approving *Ex p. Parsons* (1886) 16 Q.B.D. 532.
[61] *Cookson* v. *Swire* (1884) 9 App.Cas. 653, *per* Lord Blackburn, at p. 664; *Brantom* v. *Griffits* (1877) 2 C.P.D. 212, *per* Cockburn C.J., at p. 214.

quite different object of protecting impecunious debtors from being induced by unscrupulous lenders to sign lengthy and unintelligible documents which might often conceal the stringency of the terms of the loan.[62] It is this additional object that explains the much more severe provisions as to invalidity under the 1882 Act.

Yet the Acts did not attempt to achieve these objects by insisting that all transactions where the grantor retains possession whilst parting with the title, conditionally or absolutely, should be carried out in writing. "... Those statutes do not require that any transaction shall be put in writing; they only require that if a transaction be put in writing and be of a particular character, then that it shall be registered, otherwise it shall be void."[63] The Acts strike only at documents, not at transactions.[64] Thus, if a gift, sale, mortgage or charge be carried out so as to pass the title, a document executed in reference to that transaction on which the grantee's title or authority to take possession is not intended to, and does not, depend, is not a bill of sale within the Acts and the transaction remains effective.[65] "That is a result which it may be said enables people to drive a coach and four through the Act of Parliament; but it is a result which follows from the very way in which the Act is drawn, and perhaps necessarily drawn."[66] But only coach-drivers with a detailed knowledge of the pitfalls on the road or those who enjoy a considerable degree of luck will successfully guide their vehicles through the opening. Mere honesty and good intentions count for little, since the operation of the Acts is largely fortuitous. It is surely ridiculous that if A sells goods to B, intending to retain possession of them, but B stipulates that the property is not to pass until A gives him a receipt for the price, the chattels may be seized by A's trustee in bankruptcy or his execution creditor unless the receipt is registered as a bill of sale; whereas had there been no such stipulation, but A simply gave B a receipt in the ordinary course after the completion of an oral sale, the receipt would not be registrable and the transfer prevails against third parties,[67]

[62] *Manchester, Sheffield & Lincs. Ry.* v. *North Central Wagon Co.* (1888) 13 App.Cas. 554, *per* Lord Herschell L.C., at p. 560; *Charlesworth* v. *Mills* [1892] A.C. 231, *per* Lord Halsbury L.C., at p. 235; *Waldock*, 75–81.

[63] *Per* Fry L.J. in *United Forty Pound Loan Club* v. *Bexton* [1891] 1 Q.B. 28n.

[64] *North Central Wagon Co.* v. *M. S. & L. Ry.* (1886) 35 Ch.D. 191.

[65] *Marsden* v. *Meadows* (1881) 7 Q.B.D. 80, *per* Cotton L.J., at pp. 84–5; see also the cases cited in note 62, *ante*, and many other cases.

[66] Bowen L.J. in *North Central Wagon Co.* v. *M. S. & L. Ry.* (1886) 35 Ch.D. 191, at p. 207.

[67] *Ramsay* v. *Margrett* [1894] 2 Q.B. 18. As to receipts, see the comments of Bramwell L.J. in *Marsden* v. *Meadows*, *supra*, at p. 86, and of Bowen L.J. in *N. C. Wagon Co.* v. *M. S. & L. Ry.*, *supra*, at pp. 212–3.

unless it can be set aside as a fraudulent conveyance under section 172 of the Law of Property Act, 1925, or under the "reputed ownership" clause in the event of A's bankruptcy.[68]

Gratuitous transactions of this type would be adequately dealt with if provisions similar to those of section 42 of the Bankruptcy Act, 1914 (which enables a trustee in bankruptcy to set aside voluntary conveyances, whether fraudulent or not, that have been made within certain periods before the bankruptcy [69]) were made available also to execution creditors. Conveyances for value are wholly outside section 42 of that Act, and even under section 172 of the Law of Property Act, 1925, they can only be set aside if the creditor can prove that the grantee was aware of a fraudulent intention in the grantor. In the absence of fraud, there is little justification for depriving a bona fide transferee for value of his interest in favour of the grantor's creditors unless the grantor's appearance of ownership, due to his retention of possession with the consent of the transferee, really was the factor that induced the creditor to give credit. The Bills of Sale Acts are so drafted that they may enable the creditor to seize the transferee's goods in the grantor's hands even though the creditor was, when he gave credit, wholly ignorant about the grantor's possessions. This is particularly liable to occur where the grantor and grantee are members of the same household. No doubt in former days, when a wife could not have chattels of her own except by the device of a conveyance to her separate use, it was safe for a creditor to assume that virtually all the chattels in a matrimonial home were the husband's. But since the Married Women's Property Acts this has no longer been a safe assumption. "At the present day when wives can, and often do, possess as much property as their husbands it is impossible to say which of the two is in possession or apparent possession of the household furniture if nothing more is known than that the parties live together in the house." [70] The same might be said of ownership as opposed to possession, and of relationships other than husband and wife. If a person chooses to give credit to another on the mere assumption, unsupported by inquiry, that all or most of the chattels in the house where that other lives are his own property and will be available

[68] If the transaction were a voluntary one, whether fraudulent or not, it might be set aside under s. 42 of the Bankruptcy Act, 1914, in the event of the donor's bankruptcy, but not as against an execution creditor. See next note.

[69] Within two years before the bankruptcy even if the grantor was solvent at the date of transfer; within ten years prior to the bankruptcy unless the grantee can prove that the property passed to him at the date of the grant and that the grantor could at that time have paid all his debts without resort to the property transferred.

[70] Scrutton L.J. in *French* v. *Gething* [1922] 1 K.B. 236, at p. 245.

for execution if necessary, there is little merit in a later claim by the creditor to invoke the Bills of Sale Acts to enable him to seize goods which the debtor had in good faith transferred to another member of his household, unhappily by means of some document instead of orally or by delivery, and possibly even before the creditor ever came upon the scene.

If in such a case the court can find a constructive delivery between the parties, that would suffice to exclude the operation of the Acts. The courts have already recognised that to give a strict literal interpretation to the provisions of the Acts relating to receipts would cause many transactions outside the purpose of the statutes to be vitiated.[71] It seems no more unreasonable that, since it was not the purpose of the Acts to deal with such situations as that described above, the courts should find here a further inducement to discover a constructive delivery where that is possible. *Hislop* v. *Hislop*, the facts of which have been given above,[72] is a case in point in this respect. This was not a case of creditors having been induced, by the debtor's false appearance of ownership, to give credit nor of an attempt to defraud creditors by putting the debtor's goods beyond their reach. As a result of the husband's adultery and the ensuing divorce the law imposed upon him an obligation to pay maintenance to his former wife, yet an Act designed to protect lenders who have been deceived into giving credit came to her aid in upsetting a gratuitous but bona fide transaction made some three years previously. Sympathy for the first wife should not blind us to the fortuitous operation of the Act, in that if the gift had been made by deed the title to the furniture would have passed, possession would have followed title and the first wife's claim would have failed. Alternatively, if there had been an actual delivery, or if the court had taken the view that though the gift was not by deed yet there was a constructive delivery to the mistress at the time of the gift, the same result would have ensued since possession would no longer have been in the donor at the time of execution, and the Act would therefore have been inapplicable.

3. *Application of the Bills of Sale Acts to transfers within a common household*

As regards the application of the Bills of Sale Acts to transactions between members of a common household affecting chattels used by them together, the various types of transaction which may occur will be considered separately.

[71] See the comments as to receipts referred to in note 67, *ante*.
[72] [1950] W.N. 124; *ante*, p. 364.

(i) *Sale.* If the contract is oral and complete so that the title passes to the buyer at the time of that sale, possession, being in doubt, is deemed to follow the title into the hands of the buyer.[73] If the seller should incidentally give the buyer a receipt for the price, or a receipt with an inventory attached, such document is not affected by the 1878 Act for two reasons: first, it is not a document on which the title of the buyer depends, so that it is not a bill of sale to which the Act applies [73]; second, the document is not avoided by section 8, even if unregistered, since possession followed title and the chattels are thus no longer in the possession or apparent possession [74] of the seller, nor indeed of a "person making such bill of sale." If, however, the contract is itself in writing, or a receipt with or without an inventory attached is an essential part of the transaction on which the buyer's title depends, that document is a bill of sale within the wording of section 4, but yet will not require registration since possession will have passed to the buyer together with the title at the time of the sale. Thus no document employed in connection with a sale in a common household will be caught by the Act unless it is shown that possession was *not* intended to pass with the title, and then only if the buyer's title depends in some way on that instrument.

(ii) *Gift.* Settlements in consideration of marriage are expressly exempted from the definition of bills of sale.[75] Thus a document whereby a man conveys after-acquired chattels on trust for his wife in accordance with a covenant in an ante-nuptial settlement is not a bill of sale.[76] If he purchases chattels and brings them to the matrimonial home he is considered to be making an effective delivery to the trustees of the settlement on behalf of his wife, so that the chattels are not in his possession even though he may be using and enjoying them together with his wife.[77]

Apart from ante-nuptial settlements, the result may depend on the method employed in making the gift. Where a donor makes a gift by deed to another living with him the deed passes title, and

[73] *Ramsay*, v. *Margrett, supra.*

[74] Where the possession is deemed to follow title but the goods remain in the common household they are not still in the "apparent possession" of the grantor: *Antoniadi* v. *Smith* [1901] 2 K.B. 589, at p. 594; *Ramsay* v. *Margrett* [1894] 2 Q.B. 18, at pp. 24, 28; *French* v. *Gething* [1922] 1 K.B. 236, at p. 246 (at p. 245 Scrutton L.J. was of opinion that if the goods are in the apparent possession of *both* parties then the Bills of Sale Acts are excluded). In *Withers* v. *Berry* (1895) 39 S.J. 559, Wright J. considered that if a seller intends possession to pass at time of sale, all talk of his apparent possession is irrelevant, since s. 3 caused the Act only to apply where the seller intends to retain possession whilst giving the buyer a power to seize.

[75] B. S. A., 1878, s. 4; B. S. A., 1882, s. 3.

[76] *Re Reis, ex p. Clough* [1904] 2 K.B. 769.

[77] *Re Magnus* (1910) 80 L.J.K.B. 71, a case under the Bankruptcy Act, 1883.

possession, being in doubt, follows title into the hands of the donee; the latter's title undoubtedly depends on the deed, but the passing of possession at the same time makes the 1878 Act inapplicable.[78] Where no deed is employed but the gift is effected by an actual manual delivery of the chattels, or of one of them in the name of the whole, there can be no question of the donee's title being upset by the Act.[79] The position is less clear where a constructive delivery is relied on. The Act cannot affect the case where the donee was already in possession as bailee for the donor but is now told to hold the thing as owner, since the donor had no possession or apparent possession. Where a donor unequivocally constitutes himself a bailee for a donee who resides with him there is presumably a constructive delivery sufficient to pass the title, as the character of the donor's possession is changed. It might be argued that a document embodying the attornment would fall within the Act on the ground that the chattels are at least in the "apparent possession" of the donor due to the method he has employed in making the gift.[80] Yet the bailment is at will only and, since the donee is resident there with effective access to and control of the goods immediately, this should suffice to take the goods out of the donor's "apparent possession." If this be correct, then the 1878 Act cannot apply. In cases of purported gifts made orally or in writing, without actual delivery or attornment, it has been suggested above that in spite of the decision in *Hislop* v. *Hislop*[81] a constructive taking of possession might be implied from the donor's access to and control of the chattels from the moment of gift, provided the intention to give and receive was clear. If this were so, such a delivery would not merely cause the title to pass and so perfect the gift as between the donor and donee, but would also suffice, in the case of a written gift, to prevent the document employed from being void as against the donor's creditors under the 1878 Act as occurred in *Hislop's Case*.

A person may also make a gift by declaring himself a trustee of some chattel in favour of a donee, and this may be done orally or by some document.[82] The definition of a bill of sale includes declarations of trust without transfer of the chattels, but only, of course, if they be made in writing, since the Act strikes at

[78] *French* v. *Gething*; see note 10, *ante*. The same result is obtained where the deed is a release of the interest of one joint tenant of the chattels to another joint tenant residing with him: *Withers* v. *Berry* (1895) 39 S.J. 559.

[79] *Ex p. Hubbard* (1886) 17 Q.B.D. 690, approving the decision of Cave J. in *Ex p. Close*, 14 Q.B.D. 386, at p. 393.

[80] *Cf.* note 74, *ante*.

[81] [1950] W.N. 124.

[82] *Mews* v. *Mews* (1852) 15 Beav. 529. *Cf.* s. 53 (1) (*b*) of the Law of Property Act, 1925, in regard to trusts of land.

documents, not at transactions. But a beneficiary who is *sui juris* and solely and absolutely entitled to the whole subject-matter of a trust can at any time terminate that trust and call for the legal title.[83] It is therefore submitted that where a donee who is resident with the donor-trustee is already enjoying use and control of the trust property, he should be taken to have terminated that trust by acquiring possession as in the cases above, and in that event the declaration of trust could not be invalidated under the Act. It would be otherwise if the beneficiary were not *sui juris*, as he would have no power to terminate the trust, and the trustee would mean to retain possession.

(iii) *Pledge.* The Acts do not apply to transactions where possession is given to the grantee, so that if it be shown that a person has given possession of his chattels to another by way of pledge no document recording the transaction can be vitiated by these Acts.[84] This is as true in the case of pledges within a common household as elsewhere. Although a pledge may be created by a constructive delivery,[85] in the absence of unequivocal evidence of some delivery of possession the fact that the parties continue to share the use and enjoyment of the chattels within the same establishment might well cause the court to infer a mortgage rather than a pledge as the more natural explanation of the circumstances.

(iv) *Mortgage.* A mortgagor of chattels usually retains possession of them whilst giving to the mortgagee the title subject to a right of redemption, or a charge upon the chattels, or a licence to seize them as a security. Where possession is retained, any document creating a charge or giving a licence to seize will be totally void as it is incapable of complying with the statutory form prescribed by section 9 of the 1882 Act.[86] Though a document conveying the title subject to a right of redemption can comply with the requirements as to form, yet it will be a bill of sale and void as a security in respect of the chattels unless it is registered as such. Oral mortgages, however, cannot be affected by the Acts, even if some document is later executed simply recording what has already been agreed and not for the purpose of superseding the oral agreement, since the grantee's title does not depend upon the document.[87] Thus far there is no difference

[83] See, generally, on the subject, Underhill, *Law of Trusts*, 10th ed., 421 *et seq.*
[84] *Ex p. Hubbard*; see note 79, *ante*.
[85] *e.g.*, by the pledgor attorning bailee for the pledgee; *per* Wills J. in *Meyerstein* v. *Barber* (1866) L.R. 2 C.P. 38, at p. 52; *Reeves* v. *Capper* (1838) 5 Bing.N.C. 136.
[86] *Ex p. Parsons* (1886) 16 Q.B.D. 532.
[87] *Newlove* v. *Shrewsbury* (1888) 21 Q.B.D. 41.

whether such transactions occur between members of the same household or otherwise. As suggested in the preceding paragraph, the court is unlikely to infer that the grantee's pre-existing privilege of user of the chattels has changed into possession so as to constitute a pledge, which would escape the Acts. But it is open to the courts to find that what purports to be an outright sale is really a loan upon security, and where the parties share the use of the chattels in the same house there is perhaps a danger that the court may be tempted to infer that this is so, and that there was no real intention to pass possession, because the goods appear to be in the same situation as before. If the court construes a purported sale as a mortgage, then any document whereby the mortgage is effected will be vitiated by the 1882 Act unless it complies with the requirements set out above.[88]

To summarise the above discussion of the effect of various types of transaction between members of a common establishment it seems sufficient to say that the theme throughout is the vital need of clear evidence of the intentions of the parties, especially as to whether possession is to pass or not. If there is a lack of clear evidence the court cannot be blamed if it is influenced by appearances, whether in refusing to infer that possession is in doubt or that there is a constructive delivery, or in construing a purported sale as a mortgage. As the situation of such persons makes them peculiarly vulnerable to the operation of the Bills of Sale Acts, it is not perhaps unreasonable to suggest that the courts should regard transactions between them with sympathy, without relaxing their watch against attempts to defraud creditors.

4. *The effect of the nature of the relationship between the parties*

The foregoing discussion of these common household cases has mainly centred on two features, namely the rule that where possession is in doubt it follows title and the submission that it may sometimes be justifiable to infer a constructive delivery between the parties where there has been no actual delivery and no express attornment. On principle neither of these features should depend upon the nature of the relationship between the particular parties, but rather on the fact that they happen to live together; but that does not mean that in particular circumstances the relationship cannot affect the result, for example by shedding light on the probable intentions of the parties.

[88] *Re Lavey* (1918–9) 4 B. & C.R. 116; *cf. Youngs* v. *Youngs* [1940] 1 K.B. 760, and *Ramsay* v. *Margrett* [1894] 2 Q.B. 18.

The rule that possession follows title has been readily applied in transfers between husband and wife [89] and between a man and his mother-in-law.[90] In *Youngs* v. *Youngs*,[91] Goddard L.J., as he then was, considered that the principle would equally apply where a man was living openly with his mistress, but in *Hislop* v. *Hislop*, where this situation actually occurred, the Court of Appeal found itself unable to apply that principle because title had not passed by the written gift, though it has been submitted above that the circumstances might well have warranted an inference of a constructive delivery which would then have caused the title to pass. In *Youngs* v. *Youngs* the fact that the grantee was the servant (housekeeper) of the grantor led the court to find that she was only intended to have the use of the chattels in her capacity as a servant and not to have possession, though the transactions were genuine sales. Thus possession was not in doubt and could not follow title. This seems a clear case where the nature of the relationship between the parties affected the result of the transaction by raising a presumption that there was no intention to pass possession to the grantee.

These cases seem to show that generally the same rules should apply whether the parties be husband and wife, man and mistress, parent and child or merely two friends who share an establishment, with the exception that sometimes a particular relationship, such as that of master and servant, may in the absence of clear evidence raise a presumption that there was no intention to part with possession. If the effect of the nature of the relationship is thus limited to clarifying the intention of the grantor at the time, a subsequent change in that relationship should not affect the result previously obtained. For this reason it is difficult to see how the marriage of the grantor to his mistress three years after the purported gift in *Hislop's Case* could have cured the want of delivery which the court had held to be fatal at the time of the gift.[92] If a parol gift without delivery were to be perfected by the later marriage of the donor to the donee who was residing with him, then all the more should mere words of gift uttered by a man to a donee who is already his wife resident with him be interpreted as a constructive delivery. It is possible that the later marriage of the grantor to his housekeeper in such a case as *Youngs* v. *Youngs* would cause possession to vest in her immediately upon the marriage, but in that case she already had the title and the only

[89] *e.g.*, *Ramsay* v. *Margrett*, *French* v. *Gething*, *supra*.
[90] *Antoniadi* v. *Smith* [1901] 2 K.B. 589.
[91] [1940] 1 K.B. 760, at p. 769.
[92] The court expressly left this question open in that case.

reason why possession had not previously passed to her was that the donor did not intend his servant to have possession; her new status as wife might be taken to revoke that intention. But in *Hislop's Case* it was clear that possession was intended to pass from the first; the court held that it did not pass because the title had not passed and there was no delivery, and this would still be the position after the marriage. Thus there does not appear to be any magic in marriage in such cases; the vital elements are the common residence and the intentions of the parties.

IS THE PRISONER'S CHARACTER INDIVISIBLE?

R. N. Gooderson

"There is no such thing known to our procedure as putting half a prisoner's character in issue and leaving out the other half." This observation fell from Humphreys J. in delivering the judgment of the Court of Criminal Appeal in *R.* v. *Winfield* (1939).[1] The purpose of this article is to suggest that at common law this statement is not borne out by principle or by authority. The effect on the common law where the prisoner elects to go into the witness-box in exercise of the statutory opportunity created by the Criminal Evidence Act, 1898,[2] will also be considered. The type of situation that arises is illustrated by *Winfield's Case*, where the facts, in brief, were that on a charge of indecent assault, W. put in issue his good character for sexual morality, and the prosecution in cross-examination proved his previous convictions for offences involving dishonesty. The court held that such cross-examination was proper. The question is whether the evidence of the good or bad character of the prisoner must be confined to the trait or traits relevant to the type of crime charged. It will be submitted that the evidence must be so confined. On an indictment for murder, evidence of the good or bad character of the prisoner for honesty will be inadmissible. Not only the crime charged but also the circumstances in which it is alleged to have been committed must be considered. If the murder is committed with a hammer, character for peace and quiet on the one hand and for violence on the other will be admissible, but not if it is a case of slow poisoning.

Since the last decade of the seventeenth century,[3] the common law rule has been that the prosecution can tender evidence of the bad character of the prisoner only when he has set up his good character, and thus offered a challenge to the prosecution.[4] The prisoner himself was not permitted to produce evidence of his good

1 27 Cr.App.R. 139; [1939] 4 All E.R. 164.

2 61 & 62 Vict. c. 36.

3 *R.* v. *Harrison* (1692) 12 St.Tr. 833, 864; see also *R.* v. *Hampden* (1684) 9 St.Tr. 1053, 1103. Previously the prosecution used to attack the prisoner's character without reserve: *R.* v. *Faulconer* (1653) 5 St.Tr. 323, 354–6; *R.* v *Hawkins* (1669) 6 St.Tr. 921, 935, 949.

4 Unless the bad character is a fact in issue as in the similar fact line of cases such as *Makin's Case*, see n. 65, *post*.

character until the latter half of the same century. Stephen gives *R.* v. *Turner* (1664) [5] as one of the earliest cases, if not the earliest, in which the defence was allowed to prove the good character of the accused. In *R.* v. *Dover*, a year before, comes the first indication that this character evidence must be confined to the specific trait impeached. D., indicted for publishing a seditious libel, offered a witness to prove his good service in the trainbands. Hyde L.C.J. commented that one might be a regular churchgoer, and member of the trainbands, and yet a printer of seditious books.[6] This is not, however, a strong authority, as his Lordship and Keeling J. interrupted the character witness suggesting that D. should be cashiered the band, an indication that their minds were already made up on the issue before the jury. It was also a very strict application of the rule, if rule there can be said to be at that stage, for good service in the trainbands is evidence of loyalty, and loyalty is a trait relevant to a charge of sedition. But while there was yet no hard-and-fast rule, common sense would dictate that character evidence should bear some analogy to the issue, and this is the type of evidence usually offered. In *R.* v. *Turner* (*ante*) on a charge of burglary, the defence seem to have produced evidence of honesty. In *R.* v. *Lowick* (1696) on a charge of plotting to assassinate the King, the defence evidence was that L. was not "cruel or bloody-minded." [7] In the first trial of Captain Kidd in 1701, for murder, he sought to lead evidence of his loyal service to the Crown. Ward L.C.B. had already summed up to the jury, and rejected the evidence as offered too late, and also as of no avail on a murder charge.[8] It is not until the two great treason trials of 1794, in which Thomas Erskine, later Lord Chancellor, figured so prominently as defence counsel, that a clear rule is discernible. In *R.* v. *Hardy*, he argued that the character proved must always be analogous to the nature of the charge.[9] The Solicitor-General, Sir John Mitford, later Lord Redesdale, Lord Chancellor of Ireland, did not attack this principle, but merely objected to evidence of particular facts. Again, in *R.* v. *Horne Tooke*, Erskine advanced a similar plea: "If a man is accused of an unnatural crime, do you ask if he pays his debts?" [10] Sir John Scott, later Lord Eldon L.C., in reply, apparently agreed with this part of Erskine's argument. In neither case was the question expressly decided, but

[5] 6 St.Tr. 565, 613; Stephen, *History of the Criminal Law*, I, 449.
[6] 6 St.Tr. 539, 552.
[7] 13 St.Tr. 267, 299.
[8] 14 St.Tr. 123, 146.
[9] 24 St.Tr. 199, 1076.
[10] 25 St.Tr. 1, 348.

Erskine's argument on the point went uncontroverted,[11] and in *R.* v. *Turner* (1817) there is a clear decision. T. was indicted for treason, and his counsel cross-examined a prosecution witness as to T.'s general character. Abbott J., as Lord Tenterden C.J. then was, upheld the prosecution objection that the proper question was as to loyalty, as in rape it was to chastity,[12] and when the defence counsel was examining his own witnesses to character he took the hint and asked them as to T.'s character for loyalty.[13] He also asked permission to examine them as to T.'s reputation for humanity as this was not inapplicable to the charge. This was rightly allowed, as the alleged treason related to an armed attack planned upon Nottingham. This seems to be the last direct decision restricting the defence evidence of character to traits relevant to the charge, but the textbooks adopt this rule from *Phillipps*, 4th edition (1820),[14] onwards, and there are supporting dicta in *R.* v. *Shrimpton* (1851) (*post*), and *R.* v. *Rowton* (1865),[15] which confirm the rule and indicate that the prosecution in rebuttal is confined to character evidence of the same kind.

Under the common law, neither the defence nor the prosecution in rebuttal is permitted to give evidence of particular instances to prove the good or bad character of the prisoner. Particular good acts were rejected in *R.* v. *Horne Tooke* (1794),[16] and *R.* v. *O'Connor* (1798),[17] and in *R.* v. *Davison* (1808) Lord Ellenborough C.J. kept interrupting the defence witnesses to character to remind them that what was admissible was evidence of general character, not of particular instances.[18] Particular bad acts in rebuttal have generally been excluded since *Horne Tooke's Case*, and the rule of exclusion is clear by *R.* v. *Rowton*, where both counsel agree upon it,[19] but there is even at common law an exception that is of importance in the consideration of *R.* v. *Winfield*, though the scope of it is not clear. The exception arises where the prisoner produces a defence witness to character. Some writers hold that cross-examination by the prosecution can be directed to particular acts,[20] citing *R.* v. *Hodgkiss* (1836),[21] while others, citing the same

[11] As befits a great advocate, he was very familiar with the law of evidence. See Campbell, *Lives of the Chancellors*, VIII, 389.
[12] 32 St.Tr. 957, 1007.
[13] *Ibid.*, at p. 1058.
[14] Vol. I, 191.
[15] L. & C. 520, 537; *per* Martin B.
[16] 25 St.Tr. 1, 359.
[17] 27 St.Tr. 1, 31.
[18] 31 St.Tr. 99, 187–93.
[19] 11 L.T. 745, 746.
[20] Taylor, *Evidence*, 12th ed. (1931), 244.
[21] 7 C. & P. 298; 173 E.R. 132.

case and also *R.* v. *Wood* (1841),[22] take the view that such cross-examination must be confined to rumours.[23] The reply of the witness in answer to the cross-examination cannot be contradicted.[24] Such cross-examination is not usual in English law,[25] and in the present state of the authorities the law is uncertain, but in most United States jurisdictions the cross-examination must be confined to rumours. In *Comm.* v. *Becker* it is stated that the proper function of such cross-examination is not to establish affirmatively the fact of bad reputation, but to break down the testimony of the witness as to good reputation by showing either that the witness is not familiar with the reputation of the prisoner, or that his standard of what constitutes good repute is unsound. The cross-examination is not permitted if it will tend to prejudice the accused.[26]

A number of nineteenth-century statutes created an exception to the rule excluding particular instances, where an indictment charged the commission of a non-capital felony after a previous conviction for felony. Under the Criminal Law Act, 1827, which provided for an increased punishment in the case of conviction on such an indictment, the practice was to charge the jury to inquire at the same time concerning the previous conviction.[27] This practice was stopped by the Previous Conviction Act, 1836,[28] as being inconsistent with an impartial inquiry into the later felony, except where the prisoner gave evidence of his good character at the trial. The interpretation placed upon section 116 of the Larceny Act, 1861,[29] in *Faulkner* v. *R.*[30] has extended the scope of this exception to any indictment for committing any offence after a previous conviction. In such cases, if the prisoner gives evidence of his good character, the previous conviction can be proved to the jury before it has determined whether the subsequent offence has been committed. The exception allowing proof of a particular bad act is of course a limited one, as it is confined to

[22] 5 Jur. 225. Cross-examination of a character witness whether he had heard that W. was suspected of a robbery permitted by Parke B. The prisoner cannot be cross-examined under the Criminal Evidence Act, 1898, as to offences of which he was suspected: *Stirland* v. *D. P. P.*, see n. 69, *post*. The common law rule was ignored by the C. C. A., though applicable in *R.* v. *Waldman* (1934) 24 Cr.App.R. 204 (see Stone, *op. cit.*, 459, n. 41) and in *R.* v. *Savory* (1942) 29 Cr.App.R. 1.

[23] Julius Stone, 51 L.Q.R. 443, 458; *Russell on Crime*, 8th ed., 1956.

[24] Phipson, *Evidence*, 9th ed. (1952), 190; *Encyclopaedia of the Laws of England*, Vol. 2, 776, 3rd ed. (1938), by L. F. Sturge.

[25] Phipson, *op. cit.*, 2nd ed. (1898), 156, cited by Stone, *op. cit.*, 459.

[26] 191 Atl. 351, 356. Supreme Court of Pennsylvania.

[27] 7 & 8 Geo. 4, c. 28, s. 11.

[28] 6 & 7 Will. 4, c. 111.

[29] 24 & 25 Vict. c. 96.

[30] [1905] 2 K.B. 76.

indictments charging an offence after a previous conviction. There are two leading cases on the Act of 1836. In *R.* v. *Gadbury*,[31] there was a dictum of Parke B. that where the prisoner sought to establish his good character by cross-examination of a prosecution witness, the proviso to the Act applied and evidence of the previous conviction could be given, before the jury decided whether the subsequent offence had been committed. This observation was *obiter*, as it was not made until after the prisoner had been found guilty of the subsequent offence. The learned judge held his hand, as he was not sure whether the object of the cross-examination was to prove the good character of the prisoner. In *R.* v. *Shrimpton* (1851) the dictum of Parke B. was followed. The case is of importance with regard to confining character to the specific trait impeached. S. was indicted for larceny in 1851, and the indictment referred to a previous conviction for larceny in 1838. Defence counsel cross-examined a prosecution witness to establish S.'s good character for honesty during the last six or seven years. The prosecution were then allowed to prove the previous conviction before the verdict on the 1851 charge. Defence counsel objected, and argued before the Court for Crown Cases Reserved that by the words of the statute the previous conviction must be "in answer" to the good character of the accused. Suppose, argued counsel, the previous conviction had been for rape. Two of the five judges intervened on this point. Lord Campbell C.J. said that under the statute it must be "in answer thereto," and Alderson B. that counsel would have told the jury that it had nothing to do with his character for honesty.[32] It can therefore be submitted that for Lord Campbell the fact of a previous conviction can be proved before verdict under the Act of 1836 only where it relates to the specific trait impeached.

Before coming to *R.* v. *Winfield*, mention must be made of the famous case of *R.* v. *Rowton* (1865)[33] in the Court for Crown Cases Reserved, first argued before five judges, later before thirteen. R. was indicted for indecent assault on a boy of 14, and defence witnesses testified to his good character. In rebuttal the prosecution produced a witness, who, when asked as to R.'s general character for decency and morality, replied that he knew nothing of the neighbourhood's opinion, but his personal opinion as well as that of his two brothers was that R. was a man capable of the grossest indecency and most flagrant immorality. Counsel agreed that particular facts were inadmissible. It was decided by a

[31] 8 C. & P. 676; 173 E.R. 669.
[32] 2 Den.C.C. 319, 322; 169 E.R. 521, 522.
[33] L. & C. 520; 11 L.T. 745; 29 J.P. 149; 10 Cox 25, etc.

majority of eleven judges to two that the only evidence of character admissible was that of general reputation, evidence of disposition and the personal opinion of the witness being inadmissible. Of the two dissentients it is clear that Erle C.J. considered the evidence inadmissible anyway in this case as relating to particular facts.[34] Martin B. remarked that the two brothers must have said that R. committed indecent acts with them.[35] It was unanimously decided that the prosecution could offer evidence in rebuttal, although no reported case could be cited to that effect, and that the evidence of bad character "must be evidence of the same kind and be kept within the same line; it must be evidence of the same general description."[36]

In *R.* v. *Winfield* itself, W. was indicted for indecent assault. He produced a defence witness to character, and her examination-in-chief proceeded as follows:—

Q. "Have you ever known me misbehave myself before ladies or with ladies? Tell the court with regard to my character and behaviour."

A. "Most exemplary so far as I am concerned, and, as far as I know, I am perfectly certain that he would not resort to that kind of behaviour of which he has been accused."[37]

There is a conflict between the two reports of the case. The headnote to 27 Cr.App.R. 139 indicates that it was the defence witness to character who was cross-examined as to W.'s previous convictions for dishonesty, and so does the statement of facts. The report of the argument of the defence counsel and the judgment suggest that it was W. who was cross-examined as to his previous convictions for dishonesty, and so does the whole report in [1939] 4 All E.R. 164. It is therefore necessary to take the case both ways, first as a decision on the position at common law where the prisoner produces a character witness, who is cross-examined as to previous convictions of the prisoner not relating to the specific trait that is relevant, and secondly as a decision under the

[34] L. & C. 520, 536.
[35] 11 Jur.(N.S.) 325, 326.
[36] 11 L.T. 745, 747; *per* Cockburn C.J.
[37] The decision in *Rowton* is here violated in two respects: (i) personal opinion is offered and (ii) evidence of particular facts. W. was unrepresented at the trial, and some laxity was to be expected. Also the learned editors of Roscoe's *Criminal Evidence* state that *Rowton* is "seldom, if ever, acted on in practice": 16th ed. (1952), 104. Simon L.C. *obiter* in *Stirland* v. *D. P. P.* [1944] A.C. 315, 325, thinks that in proviso (f), s. 1, Criminal Evidence Act, 1898, where the word "character" occurs four times, it is not confined to the *Rowton* meaning; also Stone in 51 L.Q.R. 443, 460 and 58 L.Q.R. 369, 372, 380, *sed. qu.* whether *R.* v. *Dunkley* [1927] 1 K.B. 323 (C.C.A.) supports this opinion, save in the phrase "the character of the prosecutor." In *R.* v. *Butterwasser* [1948] K.B. 4, 6 (C.C.A.), a common law case, Goddard L.C.J. calls for a stricter observance of *Rowton's Case*.

Criminal Evidence Act, 1898, where the prisoner avails himself of the statutory opportunity of giving evidence on oath, and is cross-examined as to previous convictions.

First regarding *Winfield* as a decision on the common law rules as to the cross-examination of witnesses to character, and assuming that the prisoner did not go into the witness-box, it has already been noted that in principle, at any rate as the principle has been developed in the courts of the United States, the cross-examination must be confined to rumours as to particular acts of misconduct, and is not permitted if it will tend to prejudice the accused.[38] In England such cross-examination has not been usual, and with the scant authority it is not possible to assert categorically that the witness must not be asked as to particular facts. English law seems to be tending in the direction opposite to that of America because of a curious statement in Archbold: "If the prisoner endeavours to establish a good character, either by calling witnesses himself, or by cross-examining witnesses for the prosecution, the prosecution is at liberty, in most cases, to give proof of the prisoner's previous convictions: *Gadbury*, *Shrimpton*." [39] The two cases cited are of course no authority for the wide proposition laid down. It has been seen that they are merely interpretations of the Previous Conviction Act, 1836. The error in Archbold has not passed unnoticed in other textbooks,[40] but the passage was cited and approved *obiter* by the Court of Criminal Appeal in *R.* v. *Redd* (1922).[41] The remarks were *obiter* as the court held that the accused had not put his character in issue. His counsel cited *R.* v. *Gadbury* to the court, not, curiously enough, to show that the passage in Archbold was misconceived, but merely as an authority that on the facts in *Redd* the accused had not put his character in issue. Another authority sometimes cited to support the dicta in *Redd* is *R.* v. *Farrington* (1908). F. was charged with larceny, and called a character witness. In rebuttal a police constable gave evidence for the prosecution that F. was an associate of blackmailers. F.'s counsel argued before the Court of Criminal Appeal that the policeman should have confined himself to F.'s general reputation. He relied on *R.* v. *Rowton*, but the court rejected his objection principally on the ground that it should have been raised, if at all, at the trial.[42]

Enough has been said to show that the law as to putting any kind of previous conviction of the accused to a character witness

[38] See n. 26, *ante*.
[39] 32nd ed. (1949), 365.
[40] Stephen, *A Digest of the Law of Evidence*, 12th ed. (1948), 202.
[41] 17 Cr.App.R. 36.
[42] 1 Cr.App.R. 113, 119.

is somewhat uncertain, and a clear decision after a consideration of the two opposing views would be most helpful. But in *Winfield's Case* there is the more serious objection that the previous convictions put to the witness had no sort of relevance to an inquiry into Winfield's character for sexual morality. As has been seen, the direct English authority on the point comes to an end as early as 1817 with *R.* v. *Turner*,[43] an authority that character evidence offered by the defence should be confined to the specific trait involved. In the absence of modern English authority, it is instructive to consider the law of the United States of America on the subject. Wigmore states that the character offered must involve the specific trait related to the act charged.[44] He cites a large number of American authorities, as does Chamberlayne who also considers in detail the trait relevant to certain particular crimes.[45] Two cases will suffice to show the United States practice in such matters. In *State* v. *Bloom* (1879), B. was indicted for larceny. At her trial she was permitted to prove that her general moral character or reputation was good. The State appealed to the Supreme Court of Indiana, and it was held that the evidence as to character must be confined to her general reputation for honesty and integrity. Worden J. supported his view by quoting from the leading textbooks on evidence, not only from the American writer, Greenleaf, but also from Phillipps, an English writer.[46] The learned judge gave his reasons as follows: "If a defendant, when put on trial for an alleged crime, has a right to prove his good character in all respects and in all its traits, without limitation to the traits supposed to render the commission of the crime improbable, and gives such evidence, it would seem to follow that the State would then have a right to attack that character in as broad a sense as that in which it was sustained by the evidence given by the defendant. The State would then have the right, in other words, to disprove the case made by the defendant as to character in all its parts. Nothing occurs to us that the defendant may prove by way of defence, which the State may not disprove. Hence, if on the trial of a woman for larceny, she legally gives evidence of her general good character, without limitation, that evidence would include good character as to chastity, veracity, etc., as well as honesty. The State, it would seem, could then attack the case made by her in all its parts, and show that her general character for chastity, veracity, etc., as well as honesty

[43] See n. 12, *ante*.
[44] *Evidence*, I, 458, s. 59 (1940).
[45] *The Modern Law of Evidence* (1913), 4544, s. 3288.
[46] Apparently from the 8th ed. (1838), 490.

was bad. The law does not contemplate the raising of such irrelevant issues."[47] A case illustrating that the prosecution in rebuttal is confined to character evidence relating to the relevant trait is *State* v. *Bell* (1928). B. was indicted for offering a bribe to a public officer to procure the appointment of X as patrolman. Defence witnesses testified that B.'s general reputation for honesty was good. These witnesses were cross-examined as to offences against the liquor laws committed by B. On appeal to the Supreme Court of Iowa, B.'s conviction was reversed on the ground that the cross-examination should have been confined to what was said of B. in the community that would in any way affect the trait of character about which testimony was being given.[48]

Some jurisdictions in the United States allow more liberty to the defence. In *State* v. *Lee* (1876)[49] L. was indicted for rape, and it was held that the defence could prove L.'s character for peace and quiet. In *Linececum* v. *State* (1890),[50] L. was indicted for rape, and offered a witness as to his general reputation as a peaceable and law-abiding man. The trial court excluded this evidence, holding that it must be confined to his general character for chastity and morality, but the Court of Appeals of Texas reversed the conviction, holding that in all cases where the accused is charged with personal violence upon another he should be permitted to prove his general character for peace and quiet. These two cases are not really instances of the rule being relaxed in favour of the defence, though the wider question was discussed, because to commit the offence of rape the characteristics of an unchaste and a violent disposition must be combined, but two other authorities, both from Texas, make the point clearer. In *Poyner* v. *State* (1898)[51] P. was indicted for incest: he was charged with seducing his niece. A defence witness was asked about P.'s "general reputation for gentlemanly deportment and good moral character," but this question was not allowed, the trial court holding that the evidence must be confined to reputation for virtue and chastity. The Court of Appeals of Texas reversed the conviction, holding the evidence rejected to be pertinent to the issue. An even stronger case is *Johnson* v. *State* (1885), where J., a negro, was charged with an assault upon a "white" with intent to rape. J. offered testimony that his general reputation was that of a peaceable negro and one polite to "whites," especially ladies.

[47] 68 Ind. 54, 57, quoted by Chamberlayne, *op. cit.*, 4545, s. 3288.
[48] 221 N.W. 521, 523. The principle of *Comm.* v. *Becker* (*ante*, n. 26) was also applied).
[49] 22 Minn. 407.
[50] 15 S.W. 818, 819.
[51] 48 S.W. 516.

Later a State witness said that J.'s reputation as a law-abiding man was bad. The Court of Appeals of Texas observed that evidence should be restricted to the trait of character which is in issue, that is, it ought to have some analogy and reference to the nature of the charge.[52] They held that it was wrong to permit the prosecution to investigate J.'s reputation as a " law-abiding man " when he had not put it as such in issue. The contrast with *Winfield's Case* is of course striking. Had Winfield been tried in Texas, he would have had the option to put his general reputation as a law-abiding man in issue, but if he confined his evidence to his behaviour towards ladies, the prosecution could only attack his general character for virtue and chastity.

In other American jurisdictions, there is no such option open to the prisoner, and there seems to be no English authority conferring such an election upon the accused. In such American jurisdictions the prisoner if, for example, on trial for a sexual offence, must confine his character evidence to the trait of chastity. In *State* v. *Thompson* (1921), T. was charged with indecent assault, and the trial court refused to allow T.'s counsel to ask a defence witness as to T.'s general reputation as a law-abiding man, with special reference to his " personal " morality. The Supreme Court of Utah affirmed that the inquiry must be restricted to the particular trait in issue, that is, sexual morality,[53] though they noted that the doctrine was not of universal acceptance in all jurisdictions.[54]

It is submitted therefore that, despite the contrary statement in *R.* v. *Winfield*, there is a procedure known to our English law of putting part of the prisoner's character in issue; indeed our common law prevents him from leading evidence as to any part of his character that is not relevant to the crime charged: *R.* v. *Turner*.[55] Although there is no decisive English authority, the prosecution should in principle be similarly confined as in the United States.

It remains to consider *R.* v. *Winfield* as a decision under the Criminal Evidence Act, 1898, the statute that first made the prisoner a competent witness in every case, on the assumption that Winfield gave evidence on oath from the witness-box. The prisoner is not treated in every respect like an ordinary witness. He is given a shield against certain cross-examination by proviso (*f*) to section 1 of the Act. It is further provided that in certain exceptional cases the prisoner cannot avail himself of this shield.

[52] 17 Tex. 565, 573.
[53] 199 Pac. 161, 165.
[54] A reference to the Texas practice just noted.
[55] See n. 12, *ante*.

The proviso runs: "A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establishing his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

(iii) he has given evidence against any other person charged with the same offence."

Now an ordinary witness can be cross-examined as to any previous conviction, and if he denies the conviction it can be proved against him, under the Criminal Procedure Act, 1865.[56] A first reading of proviso (*f*) suggests that where the prisoner becomes a witness, and one of the exceptions applies, as it did in *Winfield's Case* as he gave evidence of his good character, he can be cross-examined as to any previous conviction whatsoever. There are, moreover, apart from *Winfield's Case*, two *sub silentio* authorities that a previous conviction of the prisoner can be proved in a case falling under exception (ii) to proviso (*f*), even though it does not relate to the specific trait involved. In *R.* v. *Solomon* (1909),[57] S. was indicted for attempted burglary. He gave evidence on oath that he was in respectable employment. On his arrest he had stated that he was a respectable man, earning his living, and had never robbed anyone of a penny. He was cross-examined, despite objections, as to previous convictions for assault and keeping a gaming-house. S. was convicted. On appeal, the Court of Criminal Appeal found it unnecessary to decide whether S. had in fact put his character in issue, as they held that there had been no substantial miscarriage of justice,[58] even if the evidence ought not to have been admitted, as it was most unlikely, having regard to the nature of the previous convictions, that their disclosure influenced the jury at all. It is

[56] 28 & 29 Vict., c. 18, s. 6.
[57] 2 Cr.App.R. 80.
[58] The appeal was therefore dismissed: Criminal Appeal Act, 1907, 7 Edw. 7, c. 23, s. 4 (i), proviso.

submitted that this is an unfair decision. If the suggestion is correct that juries will disregard previous convictions that do not relate to the specific trait, even though the judge has given them no warning on the point, there is no object in this article, but it is submitted that such evidence is highly prejudicial and likely to influence the jury. There is no doubt, however, that this case is an authority, *sub silentio* as the point was never argued, that where the prisoner has given evidence on oath and thrown away the shield supplied by proviso (*f*) by giving evidence of his good character, he may be cross-examined as to previous convictions whether or not they relate to the specific trait.

The other *sub silentio* authority, *R.* v. *Steinie Morrison* (1911), is of great importance to the subject under examination in this article. M. was indicted for a brutal murder. One prosecution witness, Mrs. D., was cross-examined by M.'s counsel as to whether she kept a brothel. M. later gave evidence on oath, and it was held that the cross-examination of Mrs. D. was an imputation on the character of a prosecution witness within exception (ii) to proviso (*f*), and that M. could therefore be cross-examined as to his previous convictions for larceny and burglary,[59] though he had never been convicted of a crime of violence.[60] M.'s counsel argued that no imputation had been cast upon Mrs. D. within the exception,[61] but he did not take the point that the previous convictions should be excluded as not relating to the specific trait. Darling J. admitted the previous convictions, but there were two matters on which the evidence might be relevant and admissible, first the credibility of the prisoner as a witness, and secondly his guilt of the offence charged. In his summing-up, that experienced criminal law judge, who so often sat in the Court of Criminal Appeal, cautioned the jury as to the danger of this evidence warping their judgment, and instructed them to confine their use of it to M.'s credibility as a witness: "... The only use to be made of these previous convictions is to show that when you have to rely upon his (the prisoner's) word as contradicting something stated by somebody else, or something which is not corroborated, you have not the word of a person who has done nothing wrong ... you have only the word of a man whose past career has been what you know it to have been."[62] This summing-up apparently received the approval of the Court of Criminal Appeal, as Lord Alverstone C.J., delivering the judgment of the court, remarked: "The

[59] *Notable British Trials*, 204.
[60] *Ibid.*, 207.
[61] *Ibid.*, 173.
[62] *Ibid.*, 277.

cross-examination of Mrs. D. . . . exposed the appellant to the risk of his past life being inquired into. It had become a question of credibility: who was to be believed when one contradicted the other?"[63]

The importance of *Morrison's Case* is that it decides that there are circumstances in which previous convictions are admissible in cross-examination, under exception (ii), to attack the credibility of the prisoner as a witness, but must not be used to prove his guilt. Julius Stone has examined the question in two learned articles, and has come to the conclusion that in all the exceptions, (i), (ii) and (iii), to proviso (*f*), the cross-examination can be used both to attack credibility and to show guilt, desirable as it is in the case of exception (ii) that it should be confined to credibility.[64] His main reason for so holding is that the legislature must have known that there was great danger of the jury using such evidence to find guilt, yet it made no attempt to separate the two uses, and that this is the more significant since exception (i) expressly refers to admissibility to show guilt as distinct from credit. The position is of course clear under exception (i), which is a reference to the common law rule of cases such as *Makin* v. *Att.-Gen. for New South Wales*,[65] permitting the prosecution to put in evidence previous similar offences committed by the prisoner to prove system, to rebut a suggestion on the part of the prisoner of accident or mistake, etc. One of Stone's reasons for considering that cross-examination under exception (ii) can be used to show that the prisoner is guilty of the offence charged is that he can find no case in which the jury have been directed to consider the evidence for one purpose and not for another; but this argument has no force in view of the summing-up in *Morrison's Case*. Stone also agrees that some of the observations of Lord Sankey L.C. in *Maxwell* v. *D. P. P.*[66] lend support to the view that cross-examination to credit under exception (ii) must be confined to the credibility of the prisoner as a witness, and cannot be used to prove his guilt, but finds them hard to reconcile with other passages in his Lordship's judgment.

His Lordship first observes that where the shield afforded by proviso (*f*) is thrown away the prisoner can be required to answer any question "subject to the consideration that the question asked

[63] 6 Cr.App.R. 159, 169.
[64] 51 L.Q.R. 443, 455–461; 58 L.Q.R. 369, 384.
[65] [1894] A.C. 57.
[66] [1935] A.C. 309. M., indicted for manslaughter while causing an abortion, testified on oath as to his good character. The H. L. held that cross-examination as to a previous charge of a like nature on which he had been acquitted should not have been admitted as it did not show bad character. It was not offered as similar fact evidence under exception (i) to proviso (*f*).

must be one which was relevant and admissible in the case of an ordinary witness." [67] He remarks that to be admissible at all it must fall under one of the two classes: (1) to show guilt (and here his Lordship is clearly referring to exception (i) for he cites *Makin's Case*), or (2) to attack credibility. In another passage he also mentions another class, which may be called (3): to rebut good character: "If the prisoner seeks to give evidence of his own good character for the purpose of showing that it is unlikely that he committed the offence charged, he raises by way of defence an issue as to his good character, so that he may fairly be cross-examined on that issue, just as any witness called by him to prove his good character may be cross-examined to show the contrary." [68] This passage is considered by Stone [69] to be hard to reconcile with the following passage at a later stage in the judgment: "And in general no question whether a prisoner has been convicted or charged or acquitted should be asked or, if asked, allowed by the judge, who has a discretion under proviso (*f*), unless it helps to elucidate the particular issue which the jury is investigating, or goes to credibility, that is, tends to show that he is not to be believed on his oath; indeed the question whether a man has been convicted, charged or acquitted, even if it goes to credibility, ought not to be admitted if there is any risk of the jury being misled into thinking that it goes not to credibility but to the probability of his having committed the offence with which he is charged." [70]

It is submitted that the view of Lord Sankey that evidence to attack credibility must not be admitted if there is any danger of the jury being misled into thinking that it goes to show probability of guilt is clearly expressed, and no doubt is cast upon it in any other part of the judgment. The case where the opinion of his Lordship is not very plain is where the evidence is admitted to rebut good character. Can such evidence be used to show guilt ? Lord Sankey compares the cross-examination in this case with that of the character witness at common law.[71] It has been noted that, at any rate in American practice, this would be confined to rumours and would not be allowed if it would tend to prejudice the accused.[72] It is not certain how far the English common law has ever reached these principles, or how far Lord

[67] [1935] A.C. at p. 318.
[68] *Ibid.*, 319.
[69] 51 L.Q.R. at pp. 456–7; 58 L.Q.R. at p. 385. See also Crown Counsel in *Stirland* v. *D. P. P.* [1944] A.C. 315, 320.
[70] *Op. cit.*, 321.
[71] See n. 68, *ante*.
[72] See n. 26, *ante*.

Sankey considers them to be preserved under exception (ii) to proviso (*f*). There are, however, two situations under exception (ii) where the evidence is not admitted to rebut good character, and the solution is not therefore obscured by any lack of clarity in his Lordship's judgment, firstly where imputations have been cast upon the prosecutor or his witnesses, and secondly where the cross-examination relates to an offence which does not impeach the specific trait involved. In these two situations the cross-examination goes to credibility, and the question is whether it can also be used to show guilt. Lord Sankey answered this question in the negative. In *Morrison's Case* (*ante*), both these situations were present: M. never gave evidence of his character, but he did attack the character of Mrs. D., and the cross-examination related to offences not analogous to the crime of violence with which he was charged. Darling J. warned the jury to use the evidence of the previous convictions only on the question of credibility. It is submitted that he should have given this warning had either situation been present, and probably would have done so, for his mind was never directed to the point that the previous convictions were not for violence, whereas the main trait in question was a disposition for violence. Lord Sankey would go further than a mere warning and exclude the evidence altogether, a course which Julius Stone deems preferable.[73]

Now, in *Winfield's Case*, was the cross-examination as to convictions for dishonesty admissible to show guilt, to rebut good character or to attack credibility? In the words of Lord Sankey, did the evidence help "to elucidate the particular issue" or go to credibility? It was not admissible to show guilt under exception (i) in the *Makin* sense. It was not admissible to rebut good character, as it did not relate to the trait of chastity, the particular trait in issue. The situation was not unlike the hypothetical previous conviction for rape mentioned in *R.* v. *Shrimpton* on a charge of larceny under the Act of 1836. Upon the construction of that statute, Lord Campbell would have rejected such evidence, while Alderson B. would have warned the jury that it had nothing to do with character for honesty.[74] Similarly under the Act of 1898, Lord Sankey would exclude the evidence altogether, while Darling J. would warn the jury that the evidence went merely to credibility. The cross-examination of Winfield is permitted only because as a witness any previous conviction can be put to him. This is the very case where Lord Sankey would exclude the evidence as prejudicial to a fair trial.

[73] 51 L.Q.R. 443, 463–4.
[74] See n. 32, *ante*.

The suggestion of Lord Sankey that cross-examination under exception (ii) is sometimes confined to the question of credibility is rejected by Stone partly on the ground of the course of decision in the Court of Criminal Appeal. Although the attention of that court never seems to have been drawn to the question under discussion, it might perhaps decide that the argument that cross-examination under exception (ii) should not necessarily be allowed on the issue of guilt had come too late. Further, *R.* v. *Winfield* has received some support from a dictum of Lord Simon in *Stirland* v. *D. P. P.*,[75] though the qualification added by his Lordship, " so far as this tends to disprove a claim for good character," seems to leave the question much as it was before. It can, however, still be submitted that a case like *R.* v. *Winfield* is a fitting one for the exercise of the discretion of the court to exclude admissible evidence. *Harris* v. *D. P. P.* is a recent case in which the House of Lords exercised this discretion and excluded evidence, admissible under exception (i) to show that the prisoner was guilty, on the ground that in the circumstances the evidence was so slightly relevant that it should be excluded as having a prejudicial effect out of proportion to its relevance.[76]

R. v. *Winfield* has now been considered both as a decision under the Criminal Evidence Act, 1898, and as an authority on the common law rules as to cross-examination of a character witness. These two points have been considered separately, but the tendency in practice is for the common law rules to be swallowed up by those applicable under the Act of 1898. This process may be an unconscious one, produced by pressure of business in the courts or by confusion of thought among the writers.[77] This tendency to merger might be supported so far as *Winfield's Case* is concerned, on the principle that proviso (*f*) is a protection given to a prisoner if he himself is a witness. If he loses that protection for himself, *a fortiori*, he cannot claim it in respect of a character witness. Otherwise the position would be that a defendant, refusing to give evidence himself, could call witnesses to his own good character, and that evidence could not be challenged to the

[75] *Op. cit.*, 326.

[76] [1952] 1 All E.R. 1044. *Semble*, this is the *ratio decidendi* of the case. It is so formulated by Lord Oaksey, *diss.*, at p. 1051.

[77] The passage in *Archbold*, see n. 39, *ante*, is another illustration of a writer's deriving a wide principle, leading to an alteration of the common law, from a case decided purely on a statute with a limited sphere of application.

The tendency for the common law rules to disappear is also illustrated by the reference in 39 L.Q.R. 212, 221 to *Barron* (No. 1) (1913) 78 J.P. 184, and *Armstrong* [1922] 2 K.B. 555, as conflicting interpretations of exception (i) to proviso (*f*), though both are decisions on the common law, so far as appears from the five reports of the *Barron Case*, and the detailed account of arguments and judgments in *Armstrong's Case* in the *Notable British Trials* series.

same extent as if the prisoner himself gave evidence. This is certainly an argument for keeping the common law rule and that of the Criminal Evidence Act the same.

It may well be that the common law rule, if rule of English law it has ever been, that cross-examination of a character witness must be confined to rumours, will be discarded. It has already been noted that it was disregarded in *Archbold* in a passage approved in *R.* v. *Redd.*[78] A rule that was so immature and so little supported by authority at the passing of the Act of 1898 had little chance of survival. But it is submitted that the common law rule that the evidence of good or bad character must be confined to the specific trait in question should be preserved even in cases under the Act of 1898. There is sufficient authority that at common law the defence must confine itself to evidence of good character relevant to the offence charged. The direct English authority stops with *R.* v. *Turner* (1817),[79] but the rule is accepted by textbook writers from *Phillipps*, 4th ed. (1820), repeated in *Best*, 12th ed. (1922), 238, onwards.[80] Lord Cockburn C.J. says that the prosecution in rebuttal should be similarly confined.[81] He is really dealing with the rule that character evidence must be limited to general reputation, but the same considerations operate here, in fact in *State* v. *Bloom*, Warden J. gives the need to limit the prosecution to the specific trait as the reason for the rule forbidding the defence to go beyond it.[82] The contrary decision of *R.* v. *Winfield* is only a dictum, as Winfield's conviction was quashed on another ground.[83] The case unfortunately escaped a contemporary note in the journals and has passed without comment into the textbooks,[84] except for a recent criticism by Nokes. The learned writer observes: "If a man is charged with forgery, cross-examination as to his convictions for cruelty can have no purpose but prejudice."[85] This criticism, with respect, goes to the root of the matter. Prejudice is the ground for exclusion. Old rules for the exclusion of particular facts from character evidence rest mainly on absence of notice and confusion of issues,

[78] See n. 39, *ante*.
[79] See n. 12, *ante*.
[80] See Taylor, *op. cit.*, 243, citing an American decision of 1829, *Douglass* v. *Tousey*, 2 Wend. 352; Phipson, 9th ed. (1952), 189, citing the dicta in *Shrimpton* and *Rowton*; Nokes, *Introduction to Evidence* (1952), 111.
[81] See n. 36, *ante*.
[82] See n. 47, *ante*.
[83] It is submitted that no rule can be *ratio decidendi* from which affirmance of the decision does not follow: Llewellyn, *Bramble Bush*, 39; see also Megarry in 64 L.Q.R. 28, 193, 454. *Contra*, J. H. C. Morris: *ibid.*
[84] Stone, 58 L.Q.R. at p. 372, treats it as a case under the Act of 1898, also Simon L.C. in [1944] A.C. at p. 329; *semble*, also Archbold, *op. cit.*, 371. Phipson, *op. cit.*, 190, treats it as of general application.
[85] *Op. cit.*, 113.

but these considerations do not apply in the case of previous convictions.[86] In determining whether a previous conviction relates to a relevant trait, the application of the rule should not be too finical. Some United States authorities err in this respect. For instance, in *Comm.* v. *Colandro* (1911), on a charge of murder, it was remarked that questions about a previous kidnapping would have been excluded if objected to,[87] and, in *People* v. *Haydon*, also a murder case, evidence as to a previous robbery was held to be inadmissible.[88] It is submitted that evidence as to these previous crimes should have been admissible to rebut the evidence of good character that had been offered, as in each case a crime of violence was in question. On the other hand, the court should not be too astute to admit such evidence. For instance, taking the facts of *Morrison's Case*, a brutal murder with robbery the object, an argument that the traits involved were violence and dishonesty and therefore that previous convictions for larceny should be admissible to rebut good character should be rejected.[89] It is submitted that a golden mean can without difficulty be found if the aim of the court is to exclude evidence which is merely prejudicial, and it is suggested that the evidence of previous convictions admitted in *R.* v. *Winfield* was certainly prejudicial to a fair trial.

[86] Wigmore, *op. cit.*, III, 538, s. 980.
[87] 80 Atl. 571, 575. Supreme Court of Pennsylvania.
[88] 123 Pac. 1102, 1112. District Court of Appeals, California.
[89] Of course no such argument was advanced.

LIABILITY IN ROMAN LAW FOR DAMAGE CAUSED BY ANIMALS

D. I. C. Ashton-Cross

Classification of Animals

In Roman law all animals are either wild or domestic.

(i) *Wild*: this category includes particularly those of an innate [1] or natural [2] *feritas*, and generally all animals not normally owned. Wild animals may, however, be owned and, as will be seen later, the owner may be under legal liability in respect of any damage done by them.

(ii) *Domestic*: these are normally owned. As a species they do not show *feritas*, though individually they may. Those which do show *feritas* are therefore regarded as acting *contra naturam* (of the species).[3] So a horse which is a kicker, or a bull which gores, both of vicious disposition, are nevertheless governed by the rules relating to domestic animals [4]; and *a fortiori* the domestic animal which has temporary lapses into *feritas*, *e.g.*, the mare which is touchy,[5] does not cease to be a domestic animal in law.

Wild Animals

I. *Liability depends on ownership*

Dealing first with the law relating to wild animals, there can be no liability unless such an animal is *owned at the time it does the damage*.[6] Buckland has pointed out [7] that the former owner of a wild beast which had escaped from his control was not (anyhow before the Edict of the aediles) responsible for any damage it did once it had escaped, nor was he under any liability for failure to keep it securely, however dangerous it was. He adds "the aediles met the case by a provision that one who kept wild

[1] Inst. IV.9.pr.
[2] D. 9.1.1.10.
[3] See Voet, *Commentarius ad Pandectas*, II, 9.1.4. As he puts it, "Since the horse and the bull are accustomed to graze in herds with other *pecudes* under a herdsman, and do not harm him, they are domestic animals and they therefore act contrary to the nature of their kind when they gore or kick."
[4] D. 9.1.1.4; Inst. IV.9.pr.
[5] D. 21.1.43.
[6] Inst. IV.9.pr.; D. 9.1.1.10. It has been suggested that this text is interpolated. See Buckland, *A Text-Book of Roman Law*, 2nd ed. (1932), p. 603.
[7] p. 206; repeated from 1st ed., p. 208.

beasts of certain kinds near a highway was responsible for any damage they did. In later law this was extended to any wild animal." This passage, read alone, might be taken to mean that the acdiles' Edict covered the case of the *escaped* wild beast, as well as the beast which caused damage while yet owned. It is, however, clear from later references that such was not Buckland's view, and there is a notable difference in the wording of the two editions.[8] In the first, Buckland had said that the aediles' remedy applied " if a wild animal was kept by the wayside, *and escaped* "[9] and caused damage: in the second edition the words " and escaped " have gone.

It is, therefore, reasonable to suppose that it was through oversight that Buckland did not make the wording at p. 206 (2nd ed.) less ambiguous. This too may be the explanation of the somewhat obscure passage on the matter in his later (1939, 2nd ed.) *Manual of Roman Private Law*, which at least suggests that the Edict was intended to apply to escaped wild animals.

It is submitted that there is no exception to the principle of ownership, the *custos* at the time the damage is done being in some circumstances regarded as owner.[10]

II. *Possible actions where the animal is owned*

Assuming that the animal is owned, three, perhaps four, actions are available to the person who has suffered damage caused by it.

(i) *An Aquilian action*, or an action *in factum* on Aquilian principles. I have not come across an example of this, but there seems to be no good reason why such an action should not be given, say, against the careless rider of an elephant, or the circus owner who fails adequately to fence the animals he has on show.

(ii) *A praetorian action*, given if a wild beast was tethered *in ea parte qua populo iter est*.[11] There is no more information about this action, but according to Paul it applied whether the damage was caused by the beast directly, or arose indirectly from its presence.

(iii) *The action given by the Edict of the aediles*.[12] To admit of this the animal must have been owned at the time it caused the damage; must itself have been either on a place

[8] p. 598, 1st ed.; p. 603, 2nd ed.
[9] The present writer's italics.
[10] Paul, *Sententiae*, I.15.2. He is referring to the praetorian action mentioned under (ii) below.
[11] Paul, *ibid.*; D. 47.11.11.
[12] Inst. IV.9.1; D. 21.1.42.

of public passage or near enough to injure a person or property in such passage; and the damage must have been done *qua vulgo iter fit*,[13] *on* the public way.

The measure of damages where a free man is injured is left to the discretion of the judge, and covers cost of treatment and loss of earnings present and future, but nothing for pain or disfigurement unless insofar as they affect earnings. In case of damage to property the amount recoverable is the double of the damage done.

This is an absolute (or at least a strict) liability. The plaintiff need not prove *culpa*, nor, presumably, would provocation of the animal by, or contributory negligence on the part of, the injured person bar his action.

(iv) *The actio de pauperie* is, in the view of a number of authorities, available in developed law in respect of wild animals. This is, however, a point of no little doubt, due mostly to certain difficult texts. These are:—

(1) D. 9.1.1.2, where Ulpian states the *pauperies* action to be applicable to *all quadrupeds*.

(2) D. 9.1.1.10, which contains an apparently contradictory dictum, also of Ulpian, that the action does *not* apply to wild beasts, ending "and therefore if a bear escapes and does damage, the old owner cannot be sued, because he ceases to be owner on the escape of a wild animal."

(3) Justinian's Institutes IV.9.pr., which states in terms almost identical with those used by Ulpian in D. 9.1.1.10 that the action does not apply to wild beasts, with the same example and the same reasoning, but does not include the passage in (1) above that the action applies to all quadrupeds.

(4) D. 9.1.4, where Paul expresses the opinion that an (*utilis*) *actio de pauperie* is competent if an animal not a quadruped has caused damage.

As regards (1) the *lex* is open to attack on numerous grounds—

(i) It is illogically placed, between a *lex* which refers to the action given by the Tables (which did not apply to wild

[13] Buckland renders these words as "*near* a highway" (p. 206—my italics) and "by the wayside" (p. 603), and very much the same translation is found in most versions. This seems to mean that the animal, to fall within the rule, must be *off*, not *on*, the road, a meaning not attributable to the word "*qua*." The writer therefore prefers Roby's "in any place where people commonly pass" (*Roman Private Law* (1902), Vol. II, p. 199).

beasts) and numerous others which without doubt refer to domestic animals only.

(ii) It is contradicted by D. 9.1.1.10.

(iii) By classical law noxal actions had probably largely lost their use owing to changes in values. In the Empire, if not earlier, it might well profit the defendant owner of an offending beast to surrender it rather than meet the damage caused by it. The tendency is to extend the aedilician action to domestic beasts, *e.g.*, to horses, mules and oxen,[14] rather than to apply the action appropriate to domestic animals to wild beasts.

(iv) It is not suggested that a *pauperies* action could be brought in respect of a wild beast not owned. Indeed there would be no point in so doing, any more than there would be in bringing a *pauperies* action if the offending animal was dead. If the offender is owned there is no need for the *pauperies* action since the action under the aediles' Edict and the Aquilian action would seem sufficiently and more adequately to meet all needs.

As to (2) and (3), Buckland [15] thinks that the *lex* is probably interpolated. He points out the apparent implication from the text that the *actio de pauperie* would have lain had the beast still been in captivity. As has been mentioned, this *lex* is nearly reproduced by the Institutes where it is less absurd, in that it does not contradict an earlier passage, but is unnecessary and makes the text more difficult of comprehension.

Interpolated or not, the *lex* does correctly state the general rule of non-liability for escaped wild beasts, and the basis of that rule; but it is unsatisfactory in failing to make clear that the *pauperies* action would not have applied even to an owned wild beast, or (if Ulpian so intended) that the action was extended to cover owned wild animals. May the explanation be that it is not the statement of the law which is wrong, but the way in which it is rationalised ? Professor Lawson points out that this often happens in interpolations.[16]

Furthermore, the word "*conveniri*" may have been intended not particularly to refer to the *actio de pauperie*, but to stress that no action of any kind (*e.g.*, Aquilian or on the aediles' Edict) could be brought.

The writer ventures the view that these two passages were included by the compilers of the Institutes in a mistaken zeal to

[14] D. 21.1.41, 43; *post*, pp. 401–402.
[15] p. 603, n. 6.
[16] *Negligence in the Civil Law*, at p. 38.

bring the whole law regarding animals under the two sections; and that no importance should be attached to it as evidence of the applicability of the *actio de pauperie* to owned wild animals.

As to (4), though writers assume that a non-quadruped is a wild animal this is not necessarily so. Geese, for instance, are notoriously aggressive. This passage affords no convincing evidence that *pauperies* applies to wild beasts. What is more, the failure of Paul to mention in his *Sententiae pauperies* as applicable to non-domestic animals, particularly in I.15.2, suggests that he did not so regard it.

A further difficulty to be faced by those who maintain that *pauperies* applies to wild animals is the necessity of getting over the rule that the beast must act *contra naturam* to impose liability on its owner. It has been suggested, but not very convincingly, that both the limitation to domestic beasts and the *contra naturam* rule are Byzantine.[17]

Buckland[18] says that Institutes (IV.9.1) allow the *actio de pauperie* for wild animals. It is respectfully submitted that this is not so. There are in the Institutes two paragraphs only on the point, and they are successive. In IV.9.pr. Justinian says that the *actio* can be brought only in the case of animals acting *contra naturam* and not if the animal is *genitalis feritatis*. In IV.9.1, after listing the animals prohibited by the aediles' Edict—the dog, the boar, the wild boar, the bear and the lion—he states that as well as (*praeter*) the aedilician actions the *actio de pauperie* is available. These two statements, following closely on each other, are at a first glance self-contradictory, and Buckland has taken the reference in IV.9.1 to the *actio* as applicable to *all* the animals listed. It is suggested that he has gone astray on this point, and that because of his apparent obsession with the idea that the aediles' Edict related *only to wild animals*.[19] In fact the Edict referred to both domestic (the dog and the (perhaps) domestic boar) and wild animals, and it is confidently suggested that the true meaning of the two texts read together is that the *actio de pauperie* can be brought only if the animal which has caused the damage is of the domestic class, and that it can then be brought in addition to the action on the Edict.

Buckland also says that Justinian declares the action of damages under the Edict to be alternative to the *actio de pauperie*. This is

[17] See *Buckland's Text-Book*, p. 603, n. 6.
[18] *Ibid.*, p. 206.
[19] See *Text-Book*, p. 206 and p. 603. In his *Manual* he refers to a "dangerous" beast in this context.

not so. Justinian's words are "*praeter has . . . aedilitias actiones, et de pauperie locum habebit*"—and *praeter* means "besides" or "in addition to."

Paul [20] adds to the list of animals of the Edict any other harmful animal, loose or tied, if not so chained as to be unable to cause damage.

It will perhaps be interesting to refer to the special liability of those who carried about snakes, mentioned by Paul,[21] who tells us that the praetor gave an action for any damage caused through fright of snakes. Does this mean an action for nervous shock, or for indirect damage, as, *e.g.*, by a horse shying at a snake? If the former, the writer has not been able to discover any like basis of claim. We have, however, met previously [22] an action for damage caused indirectly through the presence of a wild beast.

Domestic Animals

As has been said, domestic animals are those which are not as a species savage or vicious, though individual members of that species may be. Once again, the animal must be owned to infer liability.

I. *Animals must act contra naturam.*

The general rule is that there is no liability for the conduct of domestic animals unless they do their damage in acting *contra naturam*, *i.e.*, contrary to the nature of the species, not of the particular offender. A domestic animal which causes damage because it is provoked is not regarded as acting *contra naturam*.

The one exception to the general rule, when the owner is liable for an animal acting *secundum naturam*, is the *actio de pastu* given originally by the Tables but continuing in classical law, a noxal [23] action dealing with trespass to grazing by an animal of the *pecus* class. Pomponius tells us [24] that the owner of the pasturage has no right to impound the trespasser. He must treat it as he would his own animals, and may either drive it off or tell the owner to remove it. From Ulpian [25] we know that the action is available only where there is *trespass* by animals, so my neighbour has no action against me if his fruit falls on to my pasture and my animals eat it.

A lengthy discussion of this action by A. Fliniaux is to be found in *Mélanges de Droit Romain* I.247. He suggests that in the time of the law of the Tables the action differed from *actio de pauperie* in that it was based on the wrong done by an owner in *putting* his

[20] D. 21.1.41, 43.
[21] *Sententiae* I.15.4; D. 47.11.11.
[22] *Ante*, p. 396.
[23] It may not then have been noxal. (Lenel, *Edictum Perpetuum*, 3rd ed., p. 198.)
[24] D. 9.2.39.1.
[25] D. 19.5.14.3.

animals to graze on another's pasture, and it did not apply when an animal trespassed of its own accord.

II. *Possible actions.*

Assuming that a domestic animal is owned, the owner may be made liable in one or more of the following actions:—

(1) The *actio de pauperie*. In this noxal action the plaintiff need prove only the ownership and the damage. The owner, unless he can establish provocation, must either meet the damage or surrender the animal. Provocation may be—

(i) On the part of the person in charge, *e.g.*, the mule driver who overloads his animal causing it to throw its load [26]; the rider who rides negligently [27]; or the person who sets his dog at another.[28] In such cases the proper remedy is an action *in factum* on Aquilian principles.

(ii) On the part of an outsider, *e.g.*, who strikes [29] or frightens [30] another's horse. The remedy is again *in factum* on an Aquilian basis.

(iii) Even on the part of another animal.[31] Here the remedy is the *pauperies* action against the owner of the animal provoker.

(2) The Aquilian action or an action *in factum* on Aquilian principles. Typical cases are in (i) and (ii) above.

(3) In the case of an animal of the *pecus* class the *actio de pastu* in appropriate conditions. It seems likely that the Aquilian action could also be brought for such damage by grazing,[32] the plaintiff presumably being guided in his choice of action by whether the damage done was greater than the value of the offender, though this is perhaps hardly likely in the case of damage by grazing.

(4) For damage by dogs there was a special remedy under a *Lex Pesolania de cane*. Buckland [33] says nothing is known of this. On the analogy of the rule of the *Lex Romana Burgundionum* it may have provided that if a dog was allowed loose in a square or public road and did mischief the owner was liable.[34]

(5) The Edict of the aediles, as has been said, applied to dogs (and probably to domestic boars) as well as to wild animals.

[26] D. 9.1.4.
[27] D. 9.2.57; D. 9.2.8.1.
[28] D. 9.2.11.5.
[29] D. 9.1.1.7.
[30] D. 9.2.9.3.
[31] D. 9.1.1.8.
[32] See article by A. Fliniaux, in *Mélanges de Droit Romain* (1926), Vol. I, p. 247.
[33] p. 603, n. 13.
[34] P.I. 15.1.a. (Krueger's (1878) ed.).

According to Paul[35] praetorian actions extended this to other vicious animals, loose or tied up; and he adds[36] that among such are oxen which gore, mules that kick, and fractious mares. The Edict, of course, applied only when the damage was done *qua vulgo iter fit*.

As to the relative values of these actions to the person aggrieved, at a time when all are available—

(i) The *actio de pauperie* and the *actio de pastu* have these advantages—

(1) There is no need to prove *culpa* (though it may be a defence).

(2) If the value of the animal is more than the amount of damage done he should have no difficulty in getting his damages.

Disadvantages are that the value of the animal may be very much less than the amount of the damage, in which case surrender of a relatively worthless offender will not adequately compensate the aggrieved party. It is suggested that the probable reason for the inclusion of dogs in the Edict was that they are usually fierce, being, it seems, trained as guards, yet of little monetary value.

(ii) The Aquilian action should be more profitable against a rich defendant if *culpa* can be proved, because full damages can be claimed, with double on denial. The disadvantage is the question of proof.

(iii) Of the *lex Pesolania de cane* no opinion can be given for lack of knowledge.

(iv) As to the action under the aediles' Edict, no reason is given for its extension to domestic beasts. The reason regarded by the writer as most probable has been suggested above. The effect of the Edict is, it seems, to impose an absolute liability, so that a person who is injured by an animal through his own fault, or who provokes it, can claim damages. From the plaintiff's point of view this is the easiest action; and it has the further advantage to him that where the offender is a domestic animal he can bring the *pauperies* action in addition.[37]

A possibility dealt with by the texts is that of two domestic animals (examples are of rams and bulls) fighting and one killing or damaging the other. The solution is that the owner of the aggressor is liable in the *actio de pauperie*.[38]

[35] D. 21.1.41.
[36] D. 21.1.43.
[37] Inst. IV.9.1; *ante*, p. 399.
[38] D. 9.1.1.11.

The *actio de pauperie* being noxal is subject to the rules usual to such. The defendant is the owner of the animal, and the liability passes with any change of ownership. Common owners are liable each *in solidum*.[39] The death of the offender before *litiscontestatio* destroys the action.[40] There does not seem to be any such rule as that applicable to slaves, that if death occurred after *litiscontestatio* the body of the offender could (in classical law) be handed over, but we find the equitable rule that if the offender was killed after *litiscontestatio* in circumstances entitling the owner to the Aquilian action against the killer, he (the owner) must either pay the damages in the *pauperies* action or assign to the plaintiff in that action his owner's rights to the Aquilian.[41] The *action de pauperie* passes to heirs, and against them *qua* owners.[42]

The writer is greatly indebted to Dr. Lipstein for his unfailing interest and advice and for his generous assistance.

[39] See D. 9.1.1.14.
[40] D. 9.1.1.13.
[41] D. 9.1.1.16.
[42] D. 9.1.1.17.

THE CONCEPT OF A LAWYER'S JURISPRUDENCE

(continued)

B. E. King

IV

The argument of the preceding part of this article has progressed as follows. Jurisprudence, it has been contended, is thought about law, including analysis of its internal structure and exploration of its external relations. Only confusion results, however, in the absence of a preliminary indication, with some degree of precision, of the subject-matter to which the term "law" is to be applied. Jurisprudence cannot presuppose, but must begin with, a definition of the term "law."[1] The distinctive characteristic of a lawyer's jurisprudence is the criterion it adopts in framing such a definition. This, it has been suggested, is utility to lawyers, a specialised professional group whose specific interests and experience differ from those of citizens, politicians, sociologists, philosophers, or whom you will. In particular a lawyer's concept of law should be judged by its power of ordering, conceptually, the elements of the lawyer's professional experience. The best definition will be that whose analysis displays the maximum degree of coherence to be found amongst the largest number of the most important elements in that experience.

"Law," it was claimed, is a highly complex notion, best regarded as equivalent to "legal system," in which "rules" are but one important element. A beginning was then made on the attempt to build up a "functional" concept of law, starting from the notion of "events of the legal process" as units of a continuously functioning system.[2] Realisations of legal liberty, it was suggested, should be considered as among such events. But to say that there is legal liberty in respect of any occurrence is only to say that if that act or event takes place the courts will probably authorise no sanction in respect of it. If this definition is accepted it follows that, given functioning courts, all present and past

[1] Here the writer is in mere verbal disagreement with Professor Buckland when he says of Austin's first collected lectures "It is an exposition of the notions about which we must clear our minds *before embarking on Jurisprudence itself.*" "Some Reflections on Jurisprudence," Cambridge, 1945, at vii.

[2] The writer's indebtedness to A. N. Whitehead for the notions of "process" and "unit event" will be apparent.

occurrences are realisations of legal liberty,—unless they are wrongs, *i.e.*, occurrences probably involving sanctions. There is logically no third possibility.[3] Wrongs, too, are events of the legal process. Thus, there will be no occurrences which are not units in the functioning of, or the functioning which is, a legal system. And if legal rules too are units, this holds for all future occurrences which are possible. For a legal rule is nothing more than possible occurrences linked with probable occurrences,—than the probability that in certain circumstances the courts will react in certain ways.

V

Where is this leading us? Possibly into deep waters it were wiser to leave uncharted. "Those of us who have learned humility have given over the attempt to define law."[4] So said Max Radin in 1938. But some attention to the theory of definition and scientific method may be more profitable to the student than the practice of humility, and there is now much more help available to the unlearned than there was even so short a time ago. The type of definition the writer is attempting would be called a stipulative, nominal, word-thing definition in the classification adopted by Richard Robinson in his excellent study of "Definition."[5] The concept of law involved would probably be called a "dispositional" concept by Professor Gilbert Ryle.[6] The presuppositions of the method employed are well stated by Professor W. J. H. Sprott, following R. C. Sheldon[7]:—"All study of the complex world of experience, whether on the level of 'common sense' or on the more self-conscious level of scientific research, proceeds in terms of

[3] Except in the case where there is no ascertainable balance of probability as between the alternatives of sanction and no sanction. This case, where it would normally be said that the law was not clear, is the only one where, on the writer's theory, it is permissible to say that there is no law in existence on a particular point. On this view it would be logical for a court to decline jurisdiction on the ground that there was no legal norm appropriate to the facts before them. But it must be noted that this would not be to say that, *according to the law*, the case was non-justiciable. Such a statement would be equivalent to saying that each party had a legal liberty to do what in fact they had done, and that the effect of the legal position was that a practical solution of the conflict must be sought outside the courts. This position is theoretically quite different from the above-mentioned refusal to declare the legal position on the ground that there is in fact no legal position to declare. Legal systems are normally devised so as to prevent this logically possible position from arising (*e.g.*, by giving residuary legislative functions to the courts). If they were not so devised the functioning of such systems would become analogous to the functioning of a heart which occasionally missed a beat—and would risk like attendant dangers.

[4] "A Restatement of Hohfield," 51 H.L.R. 1145.

[5] Oxford University Press, 1950.

[6] "The Concept of Mind," Hutchinson's University Library, 1949, Chap. V.

[7] "Toward a General Theory of Action," Parsons and Shils (Editors). Harvard University Press, 1951. Part I, Chap. II. "Some Observations on Theory in the Social Sciences."

a conceptual scheme created out of abstractions." " —the material to which any scientific system is to be applied does not dictate the classifications or distinctions out of which the system is made. . . . So far as systems go, any abstractions coherently woven together will do; the test of a system lies in its . . . utility." [8]

VI

In the scheme to be propounded the basic abstraction is of an unusual kind. An abstraction implies something from which it is abstracted, and the term is usually applied to what is conceived as some sort of component isolated in thought from a universe of which it forms a part. But the whole universe, seen in but one of its aspects, may itself be regarded as an abstraction—an abstraction, that is, from the universe seen in the totality of its aspects. The lawyer's basic abstraction,[9] the concept of a legal system, is such an abstraction. It is the universe seen in a particular way. We are driven to this by the necessity, following from the definitions previously put forward, of including all occurrences in every legal system. What is required is the conception of a legal system as *any* state of affairs which may be seen as a functioning process centring round a court. There is no way of drawing boundaries to such states of affairs. The universe, so seen, is a legal system—or as many legal systems as there are courts around which it may be seen to centre.

This notion may be found difficult. How is it possible for the universe to be an abstraction ? But it is in fact only as an abstraction that the universe may readily be conceived at all. The real difficulty arises when we attempt a larger view, and try to include all aspects of the universe in a single mode of comprehension. Imagination boggles before this task, and philosophy itself tends now to renounce it. In our more limited endeavour it may help us to consider what happens to the residue of the universe when one of its aspects has been abstracted. In principle it is not lost from view, but merely from attention.[10] For the

[8] " Principia Sociologica " in the *British Journal of Sociology*, Vol. III, No. 3, Sept., 1952, at pp. 220 and 206–7.

[9] It is difficult to avoid confusion between two distinct abstractions which are involved. Thus each concrete legal system embodies the abstraction to which the concept of a legal system refers, but is itself an abstraction from the universe seen in the totality of its aspects.

[10] Thus to speak of looking at the universe from different viewpoints is to employ a misleading metaphor. From different viewpoints of the observer in space different aspects of the object viewed are visible or invisible. Here it is a question of the observer remaining at the same point in space and focussing his gaze on different features of the object.

mind, in order to encompass so vast a field, must concentrate its attention round some focal point. And it is only by attending to its relations to some such stable point that we are able to see the universe as a whole. Not indeed, perhaps, to see the whole of it, but to discern whatever we see of it as parts of the same whole —that is, in terms of relationships (or as having relationships) to a single point. It is on these relationships (which exist in respect of every feature of the universe) that attention is thenceforth concentrated, to the neglect of relationships to other points or between its separate features. The emergent picture of the universe is thus coherent—but it is the picture of an abstraction.

There is thus, in principle, no reason why the lawyer should not see the universe as an abstraction, *e.g.*, in terms of its relationships, or as having relationships, to a specified court. The only questions are whether the discernible relationships display a recurrent pattern, the pattern of a "functioning process"—and whether there is any point in discerning them. Should it indeed appear useful to discern some of these relationships and to neglect others, these latter may well be allowed to recede, with other aspects of the universe, from attention. It is to a type of abstraction that utility attaches. There is no need to attend to logical consequences which appear irrelevant to the purpose for which it is made. The legal liberty of our planet to swing in its accustomed orbit need find no place in the textbooks. But it follows that the mere capacity for having such liberties should be regarded as insufficient to characterise a legal "person."

It is somewhat surprising to find that something not unlike the suggested abstraction is actually made by the practising lawyer. At the centre of his specific world of experience lies the court before which he practises. His interest is focussed on the reactions of that court to *all* situations (or complexes of occurrences) in which his potential clients have been or may be involved. He acts on the assumption that these reactions display, among other recurrent patterns,[11] a pattern of authorising or not authorising the application of sanctions in certain recurring types of situation. The lawyer may be interested in but a small number of the totality of situations possible. It may be to these only that he refers when, in advising, he asserts the existence of legal liberties or

[11] *e.g.*, patterns of deference in a similar mode to the same set of sources; observance of similar modes of procedure and admission of evidence.

duties, etc., in his clients—or the existence of legal rules.[12] But the pattern displayed by these " situation " and " sanction " facts —a process or pattern of " action " and " reaction," " situation " and (positive or negative) " response "—is precisely the pattern which would be displayed by the temporal sequence of occurrences in the universe—most clearly noticeable of course in a localised central area where positive sanction responses were occurring—if it were seen as a process centring round that court. And the statements made to his client refer to just those facts which would be mentioned in describing the salient relevant facts of a universe so seen in that particular local area.[13]

VII

An attempt must now be made to formulate some more precise definitions, and it seems appropriate to begin with the central concept of a court. And yet, from a practical point of view this is the concept which stands least in need of precise definition. For the thing which the lawyer has least difficulty in holding clearly and distinctly before him is the court or courts within which he practises. Once that court is identified he may, for all immediate and practical purposes, neglect all others, and conceive the legal system with which he is immediately concerned as including no norms other than those which that court will accept, no rules [14] other than those predicting the reactions of that court. In this sense each court may be conceived as the centre of its own specific legal system. That acts permitted by that court may be punished in another will be logically irrelevant. In the one system the performance of the acts will be exercises of legal liberty, in the other they will be wrongs and/or breaches of legal duty. And two courts, or legal systems, taking such opposed views of particular human acts may function quite happily side by side

[12] In either case the same set of facts is being referred to, *i.e.*, the probability that in certain circumstances the court will, or won't, authorise a sanction. When attention is focussed on persons and their acts only, the relationships of liberty, duty, etc., in those persons to those acts are mentioned. When attention is paid to the sanction as well, the existence of a legal rule is stated. In either case a fact complex will have been hypostatised—a most convenient linguistic device. For when one situation of fact has been succeeded by another it is so easy to say that a right, etc., has been transferred, created, extinguished and so on. This brief analysis suggests that it is fruitless to inquire into the " nature " of an " entity " (a right, etc.) which is such that it can be created, etc., without ever becoming visible or tangible. A word like " right " is in fact a " counter " or " token " word, the mystery of which disappears when it is exchanged for the currency of fact situations which it represents.

[13] At this point it may be advisable to anticipate and turn to the concept of law as defined in section XII.

[14] It is hoped that confusion will not result from the writer's practice, which it is difficult to avoid, of using the term legal rule to refer both to statements and to the facts so stated.

in the same political society. The enforcement, for instance, of certain claims which in common law courts was not only a matter of liberty but of procedural right was historically an offence punishable by committal for contempt in Courts of Chancery. The two systems would, however, have clashed if one had attempted to enjoin an act when the other enjoined the corresponding abstention. Then the person concerned would have been in a dilemma. He must have disobeyed one, and whichever he obeyed he would have been punished by the other. This was the dilemma of the Sheriff of Middlesex when he debated whether he should enforce execution against Hansard and be committed by the High Court of Parliament, or decline to execute and be committed (after mandamus) by the High Court of Justice.[15] But, apart from the fate of the individual, two such courts would inevitably come into conflict. Neither could tolerate the other imprisoning persons who were executing their own commands.

The above considerations are intended to show that there is no need to consider the arrangements in a single political society as constituting a single legal system. They may be construed as constituting just so many independent or related systems as convenience and the facts require. At different periods of English history it is convenient to think of different numbers of different but concurrently functioning systems. And if by the end of the nineteenth century the number diminished until one could conveniently conceive of one system with a few appendages, the growth of administrative jurisdiction may now require the pendulum of convenience to swing back in the opposite direction. Where for instance a Ministerial tribunal adopts settled practices for the exercise of discretionary powers conferred by Act of Parliament, it may be theoretically convenient to regard those practices as embodying legal norms which are as binding on that tribunal as any other norms within its own special legal system. In that system there would be no point in distinguishing between binding norms and invariable practices, any more than there is any point in distinguishing, in the High Court system, between the binding force of statutes and that of the court-created common law. Distinction becomes relevant only when a tribunal is contemplated as included within the system which includes the High Court, and it becomes necessary to differentiate between the rules by which the High Court will fetter the discretion of the tribunal and the rules by which the tribunal alone will fetter itself. Thus the theoretical question whether a practice of an administrative

[15] *Stockdale* v. *Hansard* (1839) 9 A. & E. 1.

tribunal constitutes a binding legal norm will receive different answers according to the extent of the legal system which is contemplated as including that tribunal.

It will be apparent that simplicity and precision in "legal thought"[16] will be best secured when a legal system is conceived as centred in a single tribunal. But a number of tribunals may be so related that there is but little loss of precision in considering them as the complex centre of a single system. In this case the central component of a legal system is not a court but a system of courts. The characteristic by which it may be determined whether a number of courts belong to a single system is whether they recognise the same sources of legal norms as authoritative. If they do it may be predicted that, on the whole, the same question would be determined in the same way whichever particular tribunal might happen to hear it. And further that a single accepted set of rules determining jurisdiction, procedure, appeals and hierarchy of authority would prevent any substantial difficulties arising as to which particular court was of final authority on any particular point. Many instances will be discoverable where a large or even vast array of separate tribunals may be considered as parts of a single system, and, in fact, to all intents and purposes, as merely separate instances of one and the same court. In these instances "legal thought" may have reasonable precision though it may be focussed not on one court but on a court complex.

VIII

The definition of a court can now no longer be postponed. A court is defined as a tribunal (a person or definite group of persons) which regularly and effectively decides issues by authorising or refusing to authorise the application of force to "persons," and which supports its decisions by reference to a known and limited number of agencies which it recognises as norm-creating and accepts as authoritative in a definite hierarchy of precedence.[17] Sources of legal norms are defined as such accepted agencies, and legal norms are defined as guides to action deriving from them. By the recognition and acceptance of agencies as norm-creating and authoritative is meant that they are deferred to in practice. "Judicial thought" is defined as the mode of thought involved in this deference, and the rules of the "judicial process" are

[16] This has been defined as a distinctive and comprehensive mode of experience which consists of thinking of everything in its relation to the probable sanction reactions of a specified court. Its conclusions are enunciated in the statement of substantive legal rules.

[17] To assign this order of precedence is a necessary function of Kelsen's basic norm. It will be noted that the decisions of courts, as defined, are, by necessary implication, reasonably predictable.

defined as the rules describing the detailed mode of operation of judicial thought. This mode, in general terms, consists of acts of acceptance of the authority [18] of sources (the motive being irrelevant), the scrutiny of the established facts of the case in hand, the establishment [19] of an appropriate substantive norm to be applied, and the reaching of a conclusion (the judicial decision) following logically on the application of the norm established to the established facts. "Judicial thought" thus states its conclusions in decisions, whereas "legal thought" states its conclusions in the enunciation of legal rules. The process of legal thought follows, however, that of judicial thought. Only on this condition is it possible to make reasonably accurate prophecies of what the courts will do. It is in fact possible for the process of the lawyer's thought to follow, with reasonable accuracy, that of the judge for the simple reason that the lawyer is empirically aware of the current rules of the judicial process.

The nature of the "judicial process" or the actual mode of operation of courts, needs to be clarified by distinguishing it from the "judicial function." It is proposed that the rules of the one shall be conceived as variable,[20] and such as can only be determined in detail by observation of the current practice of the courts. It is proposed that the nature of the other should be determined completely by a jurisprudential definition. The "judicial function" is defined as the mechanical and logical application of previously and clearly formulated [21] legal norms of inescapable authority to arrive at decisions on the facts established in actual cases.[22] It will be obvious that it will sometimes be possible for

[18] These acts of acceptance of authority, which constitute, so far as the courts are concerned, the obligatory nature of legal norms, may be compared with the act of postulation of a basic norm which, according to Kelsen, constitutes, for the observer, the validity or obligatory character of a whole legal system. Once the courts have made these acts of acceptance they do indeed see legal norms with Kelsen's eyes, *e.g.*, as requiring them to authorise the application of sanctions in certain ways. It is however the probability of the application of these sanctions which constitutes legal obligation in the eyes of the lawyer's client. It is this type of obligation which is, or is stated by, a "legal rule" as conceived by a lawyer's jurisprudence. In the analysis of "legal norms," however, Kelsen's views will be followed.

[19] This process of "establishment," which may include a creative element, is explained later.

[20] Within, of course, the limits imposed by the definition of a court.

[21] This formulation need not be in verbal symbols, *e.g.*, norms whose source is in "custom" or the habitual following of a pattern of conduct. The clarity need only be relative to the facts of the instant case.

[22] This stipulative definition, which should not be mistaken for a suggestion about what the judicial function ought properly to be, may be said to set up a mechanical model of the judicial process. It defines a methodological ideal type which is not intended to correspond to the reality of the judicial process but rather to provide a definite frame of reference against which this reality may be examined and in terms of correspondence with or deviation from which this reality may be described. It is suggested that some such model is essential to accurate comparative studies of the judicial process.

a court to exercise the judicial function in this strict sense, and that sometimes it will not be possible. Whenever it is impossible the judicial process will be said to have included something beyond the judicial functions, *i.e.*, a creative element—even if this goes no further than clearing up an ambiguity in a pre-formulated legal norm. The final step in any judicial decision will be indeed regarded as having been invariably determined by strict logic, the "norm to be applied" having previously been "established" in such a verbal form as to lead logically, on the facts established, to the sanction pronounced. But the process of "establishing" the norm to be applied will be regarded as "ascertainment" of the norm only when it is mechanical, *i.e.*, where there is a single clearly recorded authoritative legal norm inescapably applying by the logic of its formula (or by the requirements of strict and inescapable rules of interpretation applied to such formula) to the established facts. In all other cases the "establishment" of the norm to be applied will go beyond the mechanical "ascertainment" pertaining to the judicial function and will include an element of creative interpretation of, or selection from among, previously formulated legal norms—or even basic invention.[23] Even, however, in the rare case of invention, provided that the invention is referred to an objective value-standard like an accepted theory of justice or currently held views of public policy or convenience, the norm established may be said to proceed from a known and authoritative (even though residuary and/or persuasive) source of legal norms. But to the criticism that too much inventiveness would take a tribunal out of the scope of the writer's definition of a court no reply can be made. It would. But who would contend that a legal system was in existence in a society where all tribunals "invented" most of their decisions ?

IX

One point that the above discussion is intended to bring out is that the exercise of the judicial function, as such, does not involve the exercise of judicial or any other kind of legal power. For the

[23] It will be seen that in the terminology here employed the norm established for application in a particular case need not necessarily fall within the definition of "legal norms." When the judicial process involves a creative element the norm "established" may never have been previously formulated in precisely those terms, nor may it follow by strict logic or by the application of strict rules of interpretation from any previous authoritative formula. In such a case the decision can be regarded as giving rise to rights and duties for the parties (which will be recognised by other courts) but whether it is to be regarded as embodying an authoritative or persuasive legal norm for the future will depend on the authority conceded to precedents in the legal system concerned.

exercise of a power is defined as an act whose performance operates as a title of rights, etc.,[24] whereas the exercise of the strict judicial function declares indisputably existing rights and does not alter, create, or even clarify them.[25] No one now imagines that this is the invariable result of the operation of the judicial process, however politically convenient it may be to maintain the fiction that it is. Thus the judicial process has been defined so that it may include a creative or legislative element. It is not pretended that the line between judicial function and judicial process is easy to draw in practice,—and it is unprofitable to discuss whether clearing up an ambiguity is declaratory or legislative in nature. The point has been settled in one way by the writer's definition. All interpretation not dictated by authority and deductive logic is regarded as creative and legislative, and as going beyond the judicial function, which is defined as mechanical. Of course, even so it may be difficult to say precisely whether there is a real logical ambiguity or even inescapable authority in any particular legal norm.[26]

If "judicial power" is seen, on this nomenclature, to be a misnomer, so also is "executive power." All power, by definition, is legislative. Its exercise is a title of rights; it creates legal rights, or legal rules, or legal norms, which are in effect only different ways of expressing the same facts. Large-scale creation

[24] "Powers" are logically derived from court reactions by the following considerations. Where a court reacts in a certain way to a certain act we may ask whether the previous occurrence of another act would have made any difference to that reaction. If it would the actor has power in respect of that act; if not, disability. Thus in respect of every conceivable act the actor has either power or disability—it either operates as a title of rights, etc.—or it doesn't. Similarly, in respect of every act he has either liberty or it is a wrong (which will also be a breach of duty if the sanction falls on him). Liberty and duty can only be defined as logical alternatives if we regard wrongs for which there is only vicarious liability as breaches of duty on the actor's part. The writer prefers to regard such wrongs as involving no breaches of duty at all, but as exercises of power entailing duties of compensation or mere vulnerability to the application of sanctions on the part of some person other than the actor. Vulnerability (the equivalent of Hohfield's clumsy "no-right not") to the performance of an act is the suggested correlative to liberty to perform that act. It is a specially appropriate term in cases of *damnum sine injuria*.

[25] This statement would attract little assent from the "fact skeptics" of the American Realist School, who would question the assumed correspondence between the "facts established" in the course of the judicial function and the actual facts. See Jerome Frank, *Law and the Modern Mind*, 6th printing, Stevens & Sons, Ltd., London, 1949, at ix.

[26] This is especially so when judicial precedents are recognised as authoritative but there are no clearly accepted rules for distinguishing between merely persuasive "dicta" and the binding element in the decision. The closest approximation to the current English practice that the writer can suggest is as follows: "A judge has authority to decide a case which is before him, but not one which is not. Any principle he regards as necessary to the decision of a case before him is, however, binding on future judges of inferior (and sometimes of equal) rank in all cases not distinguishable from that case by any consideration which, in relation to the decision reached, *and on the current scale of accepted legal values*, is material."

of general norms is the function of a legislative organ. Private individuals or lesser bodies exercise legal powers on a smaller scale. Exercise of unrestricted legal power is exercise of legal sovereignty, the power to make or unmake any legal norm or right whatever. Whether such power shall be granted to any person or body is of course a question of policy, as important as the question of how far the judicial process should go beyond the strict judicial function,—or what " decision taking " should be left to the judicial organs of a State. But the point is that there is no power in its nature executive. The executive organs may have liberties, rights and powers far in excess of those of private individuals. But there is no difference in their final analysis.

X

In the web of " coherently woven abstractions " we are trying to suggest it may now be discerned that liberties, duties, etc., or legal rules, link acts and persons with court sanction-reactions, while these are in turn linked to sources through substantive legal norms and the rules of the judicial process. This schematisation obviates the necessity of forging a direct link between liberties, duties, etc., and legal norms, or of deriving the former from an analysis of the latter. This, it is submitted, is a distinct gain. For most of the difficulties of basic theory arise from the elusiveness of the conception of legal norms. These have been defined as guides to action deriving from agencies deferred to in practice by the courts. A more detailed analysis must now be attempted.

The prime difficulty is linguistic. Norms are referred to as if they were self-sufficient entities. But the term " norm " is a relational one, like " wife," and there can no more be " a norm," as such, than there can be " a wife." An entity must be a norm, or a wife, *to* someone. But scratch a wife and you uncover a woman. A norm has a similar independent " substratum." [27] More difficult, however, than the problem of ascertaining to whom a particular woman is wife is the problem of deciding to whom a particular " substratum " is a norm. Candidates are the maker, the interpreting court, the person whose actions are therein linked with sanction-reactions of the court. In one sense the substratum is a norm to all three,—but to each its most relevant significance is different. To the maker it may signify an expression of his will (Austin), to the judge it may signify guidance in the application of sanctions (Kelsen),[28] to the subject it may signify confrontation

[27] *e.g.*, a recorded verbal formula.

[28] The practical alternatives to accepting this guidance are resignation of the judicial office or ignoring the judicial oath and risking removal from the Bench.

with the harsh probability of sanctions in certain specified circumstances (Holmes).[29] This enumeration does not exhaust the possibilities. But it does suggest that theoretical problems as to the identity and meaning of legal norms can only be solved by deciding on, and adhering to, a single consistent point of view. The viewpoint of the court is here suggested.[30] A legal norm will accordingly be further defined as consisting of a symbol-complex (the substratum) capable of meaning of a certain type, which is regularly recognised and accepted by a court as having a meaning of that type.[31, 32] Thus a particular norm is identified when a court explicitly refers its reactions to the symbol-complex which is its substratum (which may be a verbal formula, a pattern of habitual conduct, a philosophical notion, a held system of values,[33] etc.), and the type of meaning it is recognised as having is ascertained by considering the reactions (which must, by definition, be sanction-reactions) of the court to which its explicit acceptance gives rise. This type of meaning may thus be verbalised in the form "In situation X the court ought (or ought not) to apply sanction Y." This formulation implies no theory as to the nature of "ought." It only involves a definition in use of the word "ought" as follows: "When a court, explicitly relying on a symbol or set of symbols, acts in a certain way, we shall say that the court interprets that symbol as meaning that it ought to act in that way." [34]

On this view a gap may appear between the recorded verbal formula which is the substratum of a legal norm,—which may, for instance, be imperative in form and addressed to the subject—and the verbal formula in which its meaning for a lawyer's jurisprudence is embodied. The gap is bridged when it is realised that the second formula embodies what is, *to the court*, the relevant

[29] At this point the meaning of legal norms and legal rules coincide. The one *mean* the other.

[30] The viewpoint of the subject has been considered in the definition and analysis of "legal rules."

[31] *Cf.* Glanville Williams, in "Language and the Law," L.Q.R., Vol. 61, Jan., 1951, at p. 86, "'the law' is a collection of symbols capable of evoking ideas and emotions, together with the ideas and emotions so evoked."

[32] This definition is defective in that norms created by recognised sources do not depend for their validity on individual acceptance. But the adjustments needed to secure precision are involved and would break the thread of the argument.

[33] It is too often forgotten that any rational system of written norms is only a verbalised (and therefore inadequately expressed) system of values or preferences. Writing guarantees stability and certainty of the substrata of norms, but of itself guarantees neither certain nor correct statement of the values envisaged. A civilisation certain of its values might be wisest to train its magistrates in the "spirit of the laws" (*cf.* Aristotle, *Politics*, *III*, xvi, § 5) and leave it to them—as in the golden age of Rome?—and the Common Law!

[34] Thus the word "ought" could be replaced by the words "shall" or "must" or any other prescriptive form—with appropriate replacements in the defining sentence.

significance of the first. But thus far we have considered only a general type of meaning,—which remains constant. Difficulties about the identity of norms arise when we face the problems of more detailed exposition. If meaning be a component of a norm, must the same norm "have" always the same detailed meaning? It is suggested, with some diffidence, that we should postulate an affirmative answer. The same norm has always the same substratum, created at a moment in history. It "has" always the same meaning,—which is that meaning which, for any particular situation, is, having regard to the originally contemporary juristic, linguistic or cognitive conventions with regard to its substratum, inescapable. Any other possible but not necessary meaning regularly "attributed" to it must be regarded as creating a new norm, derived from the first by interpretation. The line between necessary and possible meanings cannot be drawn with precision. But a vague or ambiguous statutory enactment, when encrusted in course of time with interpretative precedents, must be regarded as being not one but a complex of legal norms.

If the above analysis be accepted it will be seen that the "elusiveness" of legal norms is due both to the discontinuity between their component parts [35] and the difficulty of analysing the statements in which their meaning is commonly expressed. This problem cannot here be further pursued, but the writer has found helpful the analysis of prescriptive statements given by R. M. Hare in "The Language of Morals." [36] He inclines to the view that "ought to act" in a certain way implies a reference to reasons for acting in that way. It is certainly for jurisprudence to explore how courts explain and rationalise their activities to themselves as well as to the general public.

XI

Before finally formulating the lawyer's concept of law it may be remarked that it may be of little immediate value to judges. For while the lawyer wants his concept to help him to understand

[35] *Cf.* Olivecrona, in *Law as Fact* (Copenhagen and London, 1939), at p. 47. "It is impossible to ascribe a permanent existence to a rule of law." This may hold of legal norms, but rules of law as defined are continuously existing probabilities continuously being realised. Such realisation, in the occurrence or non-occurrence of predicted sanction-probabilities, may be said to verify the statement of a rule. Thus a lawyer's jurisprudence provides a simple (though not strictly tenable) experimental mode of verification, *e.g.*, of the existence of duties and rules—break them and see! The discerning will correctly object that the mere occurrence of a sanction does not prove the antecedent probability of its occurrence, any more than the mere rising of the sun establishes an antecedent probability that it will. They will also be able to supply the necessary correctives.

[36] Oxford, Clarendon Press, 1952.

what the judges are doing, the judge wants a concept of law (or of what law is) which will tell him what to do. The "judicial" concept of law, assumed, consciously, or unconsciously, for this purpose, operates as an active source of legal norms, though in the most highly general way. On entering upon his office the judge takes oath to administer justice "according to the laws." Thus the concept of law he requires is one that will indicate to him, with somewhat more precision, the authority or authorities to which he has undertaken to defer. The judge's concept of law can only be discerned by empirical examination of a particular system, and the question is, "what do the judges consider to be the meaning of the term 'law'[37]?" Whatever the concept it will indicate the current sources,[38] and colour the current modes of judicial interpretation and creativeness. Thus it may vary, and does vary, from system to system, and within systems, from time to time.[39] The lawyer's "jurisprudential" concept, since it is his own construction, remains stable. It can be used as the unchanging basis of a science. It does not, however, express the nature or form, as opposed to the variable content, of law because it has revealed the unchanging form of law. It is rather that since, being a definition, it is unchanging, it may be said to give the constants or the form of law. And it is possible to find a concept which is useful and unchanging because, though it *applies* to or is exemplified in actual and changing (legal) systems, it *refers* to mere abstractions from these actualities. It does not, however, purport to refer to non-empirical realities which actual facts and events only imperfectly embody or reflect. This is the difference between finding the basic stability required by a science in abstractions and finding them in metaphysical entities. It is the difference between the nominalist and the realist view of universals, —between an empirical and a metaphysical, naturalist or idealist conception of law. This does not, however, exclude the exploration of the explanation of law so conceived into the realm of metaphysics. It is a question only of the character of the starting point.

[37] When we know the answer to this question we will be able to give some content to the curious proposition "Law is what the judges think it is." This may be analysed as equivalent to "Law is what the judges think the term 'law' applies to."

[38] Pound gets very close to an appreciation of this point in his discussion of theories of law at pp. 68–71 of his *Introduction to the Philosophy of Law*, Yale, 1925.

[39] This concept, as such, will be empirically discoverable, but it may refer—and often has referred—to what are conceived as metaphysical entities. Thus the Law of Nature may or may not be an illusion, but an accepted version of it has often been a source of law. Judges are only less well placed than legislators for making their concepts of the "nature of law" become as good as true.

XII

What is the definition of law whose analysis will lead to the results outlined above? It will, in general terms, be something as follows. Law or a legal system is any continuing state of affairs (or of the universe) which is, and which reflective thought can interpret as, a functioning system, pattern or process centring round the activities of a specified court or system of courts, the operation of factors determining the specific form of these activities (judicial thought, a hierarchy of sources of legal norms, a system of legal norms) and acts giving effect to court decisions,—and which is such that its description over an appreciable duration of time may include

(a) an indefinitely large number of empirically verifiable propositions (the products of "legal thought") alternatively

(i) expressing, with a high degree of accuracy, the relation between all possible occurrences or situations and probably consequent court reactions in effectively authorising or refusing to authorise the use of physical compulsion (sanctions) against persons,—in the general form "if situation X then sanction Y" (rules of substantive law), or

(ii) affirming the existence of substantive liberties, duties or powers attaching to persons;

(b) a limited number of such propositions describing, with a similar degree of accuracy, regularities in the activities of the specified court or court-system in

(i) hearing issues (rules of evidence and procedure) and

(ii) their mode of reaching conclusions (rules of the judicial process); and

(c) a number of true propositions asserting all human activity within a definite area of ordered society and during the above-mentioned time to be either past or present realisation of substantive liberties, performance of duties, or wrongs or breaches of duty which have been or will be followed by the above-predicted sanctions to the extent needed to guarantee the maintenance of general order within that area (the society to which the legal system "belongs").[40]

[40] This conception can be pictorially represented by a diagram showing the temporal sequence of events circling clockwise between an observer and a central court on which his gaze is focussed. As possible future events approach the observer he thinks "legal thought" (represented by a line from his mind linking them to the probable reactions of the court) and states legal rules. To do this his mind's line of thought follows the thought processes of the court, which refer the same events (upwards) to norms dropping down from sources above them, and, following the rules of the judicial process, produce decisions (downwards) as to sanctions. As events in the temporal sequence

XIII

It may well be objected that there is an element of imprecision in the above definition. To this it may be replied that a legal system may function more or less efficiently (or, more accurately the type of pattern of functioning which constitutes a legal system may be more or less clearly illustrated in a particular area of society),—and that a lawyer's concept of law is not to be tested by its ability to mark with precision the exact moment at which a legal system comes into existence or breaks down. It will do if it is precise enough to identify, and assist in the understanding of, any "legal" system in sufficiently enough working order to afford scope for professional lawyers. To reduce the margin of "play" in the definition would be to reduce it to the definition of an ideal type, never fully exemplified in concrete situations,—and perhaps to suggest an unwarranted degree of certainty in legal affairs. This would diminish its utility,—as would any attempt to beg, by definition, the question of the relation of law to justice. But definitions of purely ideal types, like definitions of geometrical forms, have their measure of practical usefulness, and it must be suggested that it is this sort of utility which may have to be attributed to the suggested definition when used for interpreting the system commonly called "International Law." This system conforms to the definition,—but with certain exceptions. It cannot therefore be designated "law" or "imperfect law," but rather as "imperfectly law." Such a statement may be made with regret,—but implies no denigration when it issues from a lawyer's jurisprudence.

A further possible objection is that the universe does not appear as a legal system to the eye of the untutored, and can so appear only after the suggested definition has been settled in his mind. In other words, that the "process of functioning" described is chiefly a movement of the observer's eye from possible event to probable sanction, and not a movement of the universe at all. This is very largely true. From the lawyer's point of view the movement of the universe is almost exclusively one of liberty,

pass from mere future possibility to present realisation and then into the past they become exercises of liberty, or performances of duty, or wrongs or breaches of duty—in which case sanctions probably follow—unless general order can be maintained without this. In this case it must be assumed that fear of sanctions (which, in any case, seldom plays an important role) is of but minimal importance in the maintenance of order. Perhaps, too, the legal system here is almost redundant and scarcely discernible, so that the behaviour patterns in the temporal sequence are seldom those of duty-performance, but rather patterns imposed on legal liberties by conventional or religious norms. For organisation and order there must be in society. But the use of force is only the price of sin, and the less sin the less need for *legal* norms, and the less need for employing the sanctions of such legal norms as there are.

discerned as such only by the movement of his eye to the negative reaction of the chosen court. This liberty displays, as such, no pattern. It is the "natural right"[41] of Hobbes—to do whatever may be possible. Possibility—if the contradiction in terms may be excused—is indeed limited, by patterns imposed by necessity,[42] and other forms of obligation. But these patterns *in* legal liberty are not, to the lawyer, of direct concern.[43] His specific interest is in the court free pattern *of* liberty. And this is objectively real. This is the light, shown up against the dark background, however small, of patterned positive court reactions and the patterns of duty performance in a localised area (chiefly duties of abstention) which these reactions point to and emphasise.

Exploration of the "nature of law" has been eschewed in this article. But it is hoped that the very comprehensive nature of the conception put forward will make it useful as a starting point, not only for explaining the explorations of others, but for exploring new possibilities of explanation. In particular it seems to the writer to employ conceptions closely allied to those adumbrated by Talcott Parsons in "The Social System"[44] and in the pioneering sociological work of Parsons and Shils (Editors) "Toward a General Theory of Action."[45]

[41] Leviathan, Part I, Chap. XIV. The writer is indebted to Hobbes for the comprehensive notion of legal liberty here suggested.

[42] But not necessarily irksome, if the poet can be trusted. *Cf.* Arnold:

"With joy the stars perform their shining,
The sea its long moon-silvered roll . . ."

[43] Save when they are patterns of duty performance, which, according to Duguit, are the only patterns of conduct the subject has any liberty or right to display. The sociologist is, of course, interested in all patterned conduct and in the inter-relations of different types. This wider interest accounts for the unsuitability of the sociologists' definitions (*cf.* Ehrlich and Malinowski) for a lawyer's jurisprudence.

[44] Tavistock Publications, Ltd., London, 1952.

[45] Harvard University Press, 1951. This work and the work of Parsons form the subject of the article by Professor Sprott, quoted *supra*. See note 8.

THE HUMBER FERRYMAN AND THE ACTION ON THE CASE

Albert Kiralfy

In my recent book on the *Action on the Case* (1951) I advanced the view that the famous *Humber Ferryman Case* [1] was in the true line of descent of the action on the case. I dealt with it mainly, however, in connection with carriers' liability [2] and a few further remarks may be necessary, in order to explain how far, if at all, my views differ from those put forward in the textbooks. The report in the *Book of Assizes* may be found translated in Professor Plucknett's treatise [3] and in Mr. Fifoot's book [4] but, as it is brief, it may be worth while beginning with Professor Plucknett's translation, *viz.*:

> "J. de B. complained by bill that G. de F. on a certain day and year at B on Humber undertook to carry his mare, [taken] in his boat, across the water of Humber safe and sound; whereas the said G. overloaded his boat with other horses, by reason of which overloading the mare perished, to his tort and damage.
>
> "*Richmond.* Judgment of the bill, which does not suppose that we have done any tort, but rather proves that he would have an action by writ of covenant or trespass.
>
> "Bankwell J.K.B. It seems that you did him a trespass when you overloaded his boat, so that the mare perished; and so answer.
>
> "*Richmond.* Not guilty and (the others said) we are ready to aver our bill."

The original record of this case has been published by Dr. M. Hastings [5] from the original plea roll.[6] It runs:

> "It was found by verdict of the jury of the hundred upon whom John de Bukton of Cave, plaintiff, and Nicholas at Townsend of Hessel, put themselves, that the said Nicholas on Monday next following Martinmas in the 20th year of the

1 Y.B. 22 Ass. f. 94, pl. 41.
2 *Action on the Case*, p. 154.
3 *Concise History of the Common Law*, 4th ed., p. 441.
4 *History and Sources of the Common Law—Tort and Contract*, p. 330.
5 XIII *Bulletin of the Institute of Historical Research*, London (1935), p. 36.
6 K.B. roll 22 Edw. III, Mich. m. 85, Yorks.

reign of the present King, received from the said John, a certain mare at Hessel for safe carriage over the Humber in the said Nicholas' ship, and the said Nicholas so overloaded that ship, against the will of the said John, that he lost that mare, by the said Nicholas' fault, as the said John by his bill complains, to the damage of the said John in forty shillings.

"Judgment: Therefore it is awarded that the said John recover against the said Nicholas his said damage. And let the said Nicholas be taken."

Mr. Fifoot's attack on this case is based on his rejection of Sir William Holdsworth's thesis in favour of Professor Plucknett's, but it does not appear that Professor Plucknett completely rejects Holdsworth's view, though he does suggest a number of doubts. Professor Plucknett does refer to several positive possibilities.[7] I completely agree with his view that the omission of the word "*assumpsit*" is not fatal to the identification of the *Humber Case* as an action on the case.[8] The Black letter report speaks of the horse as "taken" in the boat and then the undertaking to carry follows. The "taken," which I have inserted in the translation from the *Book of Assizes* for the "pris, etc." of the report, probably refers to the "received" of the record, and the phrase "for safe carriage" does amount to an undertaking. It may be argued, however, that I have not directly met the two doubts raised by Professor Plucknett, *i.e.*, that a "*capias*" issued against the unlucky ferryman, and that the arguments of Richmond for the ferryman suggest that the cause of action was nebulous and neither contractual nor tortious.

The Capias

Professor Plucknett considers that the issue of the *capias* identifies the *Humber Case* as a case of pure trespass, not of an action on the case, though he points out that this is difficult to reconcile with the facts of the case and its treatment by later lawyers. My submission here is that it was not yet clear whether or not a *capias* would issue at this early date, even where no violence was charged. The ferryman was presumably arrested by a "*capias ad respondendum*" and later committed under a "*capias ad satisfaciendum.*" The statute of 1504 [9] provided that the same process might be used in case as in trespass, and it is clear that a *capias* would not issue before this statute in an action on

[7] *Ibid.*, p. 442.
[8] *Cf. The Action on the Case*, pp. 139, 154, 159.
[9] 19 Hen. 7, c. 9.

the case.[10] Now the real authority for this difference was a decision in the *Innkeeper's Case* in 1368.[11] The innkeeper was held strictly liable here although not personally to blame for the loss of his guest's goods. Both reports of the case state that the defendant had been arrested by a *capias* (*ad respondendum*) and that the counsel for the plaintiff asked that he be taken in execution by a *capias ad satisfaciendum*. Knyvet C.J.K.B. refused this order, saying, in one report, " that would be unjust, unless there was some fault in them, for, as they are charged by law and no manner of fault is in them, it would not be right to imprison them," [12] and in the other report, " You will never have that, since the *capias* issued contrary to law, and it was the court's mistake, and not his fault." [13]

A later explanation may be found in *Foster* v. *Jackson* [14]: " For at the common law, upon an action of the case against an host for goods lost in the inn, or against a sheriff for an escape, no *capias* lay, 42 Edw. 3, f. 11 and 42 Ass. pl. 17, for it was but *culpa*, sometimes *levis*, sometimes *lata*, a negligence but not a wilful wrong." This shows that in 1368 the fact that *capias* would not lie in an action on the case was not transparently obvious, and I do not feel that the use of the *capias* in 1348 can be treated as clear proof that the *Humber Case* was not an action on the case.

That the consequential effects of distinguishing between direct and indirect trespass took time to work out is borne out by the *Surgeon's Case* in 1374.[15] The Chief Justice told the defendant that he could escape from liability in an action on the case by waging his law, saying, " This writ does not allege ' force and arms ' nor ' against the peace,' so that wager of law is to be allowed. And this is the opinion of the whole court." But the defendant chose to waive this privilege and, thanks to this lucky accident, trial in actions on the case was always by jury, as in trespass. Our law of *indebitatus assumpsit* could never otherwise have developed in later times, as case would have shared the inconvenience of debt.

Richmond's argument

If the Black letter text were accurate, Richmond was treating the *Humber Case* as neither covenant nor trespass, and the nature

[10] *Sir William Herbert's Case*, 3 Rep. 12a.; *Rogers* v. *Mascal*, 1 Sid. 248 at 259, " *capias* in an action on the case is given by the statute 19 Hen. 7, c. 9."
[11] Y.B. 42 Edw. III, P. pl. 13, f. 11; *ibid.* Y.B. 42 Ass. f. 260b, pl. 17. See, generally, Kiralfy, *Action on the Case*, p. 152.
[12] Y.B. 42 Edw. III, P. pl. 13, f. 11.
[13] Y.B. 42 Ass. f. 260b, pl. 17.
[14] Hobart 56.
[15] Y.B. 48 Edw. III, H. f. 6, pl. 11; *cf.* Fifoot, *op. cit.* 82.

of the form of action would be obscure. Fortunately it is possible to find unpublished manuscripts which seem to throw doubt on this text and offer a superior reading.

The Black Letter.[16] "The bill does not suppose that we have done any tort, but rather proves that he would have an action by writ of covenant or trespass."

A London Manuscript.[17] "The bill does not suppose any tort in us but proves that he will have an action by way of covenant *and not* by way of trespass (*'et nemye per voie de trespass'*)."

An Oxford Manuscript.[18] "The bill supposes no tort in us and hence proves that he will have an action by writ of covenant *rather than* by way of trespass (*'plus qe per voie de trespass'*)."

In other words, Richmond is simply producing the stock argument of later years,[19] that breach of contract is a breach of covenant, and not remediable in the royal court in the absence of production of a sealed document. Richmond is admitting that the plaintiff's bill is some form of trespass, and therefore tort, and arguing that the matter is merely contractual.

This does not mean that I consider that the court thought, in the *Humber Ferry Case*, that it was dealing with a case of direct trespass. As early as 1329 we have an instance of an action for misfeasance in contract[20] in much the same form as the *Humber Case*, and an argument much like that of Richmond was used. In that case the plaintiff failed, but it seems clear to me that judges knew about such cases, and the omission of any reference to "force and arms" or "The King's peace" in the record of the *Humber Ferry Case* seems to put it in direct line with such undoubted actions on the case as the *Surgeon's Case* already cited.[21]

[16] See note 1.
[17] Br.Mus.Harl. 811, f. 38.
[18] Bodl. 364, f. 90.
[19] Kiralfy, *Action on the Case*, p. 147; Y.B. 2 Henry IV, M. pl. 9, f. 31.
[20] Kiralfy, *Action on the Case*, p. 138.
[21] *Supra.*

LIVRE JUBILAIRE DU CONSEIL D'ETAT[1]

C. J. Hamson

This imposing quarto volume is offered to the public as a permanent memorial of the 150th anniversary of the Conseil d'Etat. It is a remarkable book, not unworthy of the very remarkable institution which it seeks to portray.

Although the Conseil, as the Conseil du Roi, goes back a very long way in French history, it suffered an interruption at the French Revolution. The interruption proved indeed to be a minor one, lasting nine years only. Nevertheless, the Conseil was in some sense reformed by Napoleon under the Constitution du 22 Frimaire; and as the Conseil d'Etat it met for the first time on Christmas Day 1799 (a day then disguised as 4 Nivose An VIII) under conditions of no small informality. It is its first meeting under Napoleon which has been selected as the new *terminus a quo* of an institution in reality a great deal older.

The book consists of some 50 articles (of very unequal length, one of them being an extensive monograph) and is divided into two parts. The second, shorter, part (though of over 200 pages) consists of contributions by persons who are not French and is concerned mainly with the influence of the Conseil d'Etat outside France, though it also includes articles on administrative questions in the United Kingdom (by Prof. W. A. Robson) in the United States, and in Canada (by the Chief Justice of Canada). It is proposed in this review wholly to neglect[2] this part, however great its interest, principally because the English reader will find greater profit in the account given of the functioning in France of the authentic, the French, Conseil d'Etat : which may fairly be called the creator of the only system of administrative law properly meriting that title.

The purposes of the first part of the book (pp. 31–481) as stated in the preface of the Vice-President,[3] Monsieur René Cassin, are twofold :

[1] Paris, Receuil Sirey, 1952; 693 pp. in quarto; 3250 frs.

[2] Attention should, however, be called to the article by MM. Vauthier and Moureau, members of the *Belgian* Conseil d'Etat, concerning the recent reception in Belgium of an institution foreign to that country. The mode of this reception is particularly instructive for an English reader.

[3] The reader is reminded that the Vice-President is effectively the chairman or director of the Conseil d'Etat during his period of office. the titular President being the Garde des Sceaux who presides on purely ceremonious occasions.

> To give some account of the historical continuity and the agelong empirical evolution of an institution which has been regarded as indispensable to the organisation of government in France whatever may be the complexion of the regime from time to time; and secondly, to enable the reader to penetrate into the interior of the Conseil d'Etat, to observe it at work, to see how it actually functions and how it deals with the infinitely various business entrusted to it.

It is striking how successfully the second purpose in particular has been attained. It is perhaps the chief merit of this publication that it *does* enable us to see the Conseil at work. We are enabled to do so principally because the articles are contributed (almost all of them in this part) by the members of the Conseil themselves—by the persons, that is, who actually conduct its business and who, moreover, by a long training and tradition have learnt superlatively well to mean what they say and to say, shortly, what they mean.

The quality of the contributions, by any standard, is outstanding: their value is incomparable when it is appreciated that they have been written by such authors as the President of the Section Sociale, the President of the Section de l'Intérieur and the person who now is President of the Section du Contentieux, an office second in importance only to that of M. Cassin himself. Yet the galaxy of talent is such that it seems invidious to mention the holders even of these offices; for we have also the contributions of presidents of sous-sections du contentieux (the normal organs of judgment), of senior Conseillers d'Etat, and of Commissaires du Gouvernement; and the contributions of some of the youngest members of the Conseil, the auditeurs, match those of their elders. Indeed one might select as particularly meritorious the short note by M. Antoine Bernard, who is perhaps the most junior of the contributors. The contributors, however, would no doubt prefer that the reviewer should regard their work not as attached to any particular name, but as the expression collectively of the sense and the spirit of that institution of which in their daily business it is their proud boast to be the anonymous exponents. It should be enough to say that in this instance also they have served "la maison" extremely well.

The traditions of the Conseil d'Etat are such that, however great its evolution over a period of time and however much it may owe to particular persons, the institution remains greater than any individual; and his immediate influence should be reckoned comparatively small. Yet the Vice-President for the time being can, and does, give direction to the activities of the whole, and

especially to those activities which may be termed in some sense supererogatory. It is certainly not fanciful to see the hand of M. Cassin in the decision which led to the production of this volume. Perhaps, having been formerly a professor of the Faculty of Law of Paris, he is more conscious than were his predecessors of the need to make available to study the riches of the Conseil. It is during his vice-presidency that has been inaugurated the series of *Etudes et Documents* (an annual production now in its seventh year and again the work of the members of the Conseil principally) which has become an indispensable source of information concerning the Conseil. Indeed, the *Livre Jubilaire* may be regarded as a specially grand and specially valuable edition of *Etudes et Documents*. All serious students of the Conseil are, and long will continue to be, under a great debt to M. Cassin for having inspired the publication of these volumes; and it may be one of his many enduring titles to fame that he has appreciated the desirability not so much of publicising the Conseil's work as of submitting it fully and frankly to the scrutiny of any observer, in the well justified confidence that it will abide the impartial question.

Great as may be our debt to M. Cassin as the inspirer of these publications, we are under an obligation as great to the members of the Conseil who have contributed to their contents. It is really astonishing that these men, who discharge functions discharged in England, if at all, by High Court judges and the highest civil servants, should have found the time and had the zeal and possessed the ability to accomplish, in addition to their normal overwhelming business, this supplementary work of such a degree of excellence. In England a performance even remotely equivalent is beyond the bounds of imagination.

Judged by the standard of providing information otherwise virtually unprocurable, the articles which may be reckoned the most valuable are those in the section (pp. 375–477) which deals with the legislative and administrative business of the Conseil d'Etat—with its "*rôle consultatif*": mainly because the opinions expressed by the Conseil when acting as the government's or the administration's adviser are necessarily confidential. Some of these "avis" have indeed been published, but that is highly exceptional. It is only when the Conseil d'Etat is "statuant au contentieux" that it sits in public, and even that degree of publicity is relatively an innovation, dating from 1831. It is thus particularly valuable to have described, in the article by M. Marcel Oudinot, Conseiller d'Etat, entitled "Le rôle du rapporteur devant les formations administratives," the actual methods of work (formal as well as

informal) adopted by the administrative sections of the Conseil d'Etat, and to note how closely they correspond with the fundamental methods of the Section du Contentieux, except that in the administrative sections there is no commissaire du gouvernement and no parties strictly as such.

Even more valuable is the general article (p. 395) by M. André Andrieux, Président de Section, on "Le Rôle Consultatif du Conseil d'Etat." The matters of interest upon which he touches in so short an article are innumerable: perhaps we may select for mention here the relationship between the administrative sections and the Section du Contentieux. Not only may an administrative section be asked by a Minister for advice, in a matter in which action by him is almost certain to provoke litigation in front of the Section du Contentieux, but we are told (p. 398) that judgment having been given in that Section, an administrative section may be consulted by the Minister about "les difficultés que rencontrait l'exécution de décisions du Conseil d'Etat statuant au contentieux." Clearly the situation is one of not a little delicacy. Another Conseiller d'Etat whose work is mainly in the administrative sections, M. Henry Puget, is also concerned with the same question. He says, p. 127:

> "Des textes délibérés et acceptés par l'Assemblée générale peuvent être et sont parfois annulés au contentieux. . . . Il n'en reste pas moins que le résultat est assez choquant. En présence de l'annulation d'un règlement d'administration publique, on est fondé à s'étonner au dehors de ce qui semble être, et est bien jusqu'à un certain degré, un revirement du Conseil pris comme un tout."

M. Puget, whose article it may be permitted to the reviewer very specially to commend, is evidently justified in stressing the importance of co-operation between the various branches of the Conseil d'Etat—a co-operation which is in fact markedly high. Yet to the English observer it appears that the special merit of the Conseil d'Etat, and its extreme historical advantage, consists precisely in the fact that it combines within itself this double and contradictory function. In its Section du Contentieux, as judge of the administration (including therein any act in which the Conseil d'Etat itself, in its other capacity as the administration's adviser, may have had a hand) it is, and must remain, wholly unfettered, sovereign and mindful only of legality and equity. Nevertheless, judgment having been rendered, the Conseil d'Etat (unlike the English tribunal) cannot, and must not, let the administrator go hang: it is bound to discover some method of administration consonant with that legality and equity upon which

it itself has insisted. It is the chief glory of the Conseil that it has so far managed to hold together these warring opposites. Long may it continue to do so. But it is of importance that the outside observer also should be conscious of this tension between its functions, which is felt by its own members, and he also should remember that the Conseil d'Etat will probably continue its spectacular course "au contentieux" only so long as it succeeds in preserving, as one entirety, the confidence of the "active administrator."

Other articles in this section review the activity of the Conseil as the adviser of the government on economic policy (mainly through its Sections des Finances et des Travaux publics) on social security (in the Section Sociale) on local government (part of the business of the Section de l'Interieur) and more recently on the organisation of the Union Française, which may be described as virtually a Commonwealth. M. Michel, Président de Section, in a note of which M. Canet is joint author, reminds us of the role which the Conseil discharged as the architect of the great Napoleonic codes and shows us how the Conseil has continued to act as not merely a consolidating but as the rationalising influence in the supervening mass of legislation. Indeed many passages in other articles stress the importance of the function newly assigned to the Conseil by virtue of which any government Bill before being brought before the legislature must be submitted to the Conseil for its examination and advice, usually expressed through its Commission permanente. M. Canet also contributes an extremely interesting study of the work of the Section de l'Interieur in the elaboration of the "régime des fondations," institutions which have in France an ambit almost equal to that of charitable trusts in England. He makes the point, which is apt to be overlooked, that the administrative sections also have a "jurisprudence"—which we may translate as a settled habit of decision—comparable with, and second only in importance to, that of the Section du Contentieux itself.

Critical, however, as may be the work of the administrative sections, the Section du Contentieux overshadows them all. The secret of the power and the success of the Conseil lies, without doubt, in its centralisation—in the fact that it has congregated into one entity not only a multitude of functions but a body of men whose counterparts in England, if they exist at all, we have dispersed and dissipated: it is its unity which makes its strength. Nevertheless, within that unity, the supremacy is vested in the Section du Contentieux. That is perhaps the supreme triumph of the French system—that in the administrative field it has vested

supremacy in that part of its organisation which, whatever its relation with the administration, is in the fullest and final sense a judicial body acting judicially: a body which is independent, which sits in public, and to which the aggrieved individual may bring his individual complaint against any act whatsoever of any member of the executive, however exalted, even if that act has been advised or endorsed by the Assemblée Générale [4] of the Conseil d'Etat itself. The Section du Contentieux is not bound by any act of the executive, however advised or endorsed; it alone has, and exercises, the ultimate power not only of annulling that act but of declaring it illegal and awarding damages to the person injured by it. It is to the action of the Section du Contentieux that attention is supremely directed: that is the body, which by its case-law, the contentieux administratif, has built up a system of administrative law. Indeed the very words "administrative law" are, to this reviewer, incomprehensible except by reference to and in relation with a judicial body such as the Section du Contentieux capable of exercising, and actually exercising, an effective judicial control over the administrative act as such. To speak of administrative law in England, where such a body does not exist, is to use very Pickwickian language.

The importance of the Section du Contentieux is evidenced, in this book, both by the space expressly devoted to it (pp. 143–377) and by the constant reference to it throughout the volume. There are, however, three articles which especially merit notice, each contributed by a president of one of the subsections of the Section du Contentieux. The first is by M. Bouffandeau, who has since become President of the Section as a whole, and as such occupies the key position in the organisation. He concerns himself with perhaps the most complicated legal problem connected with the Conseil d'Etat—namely the delimitation of its competence as an administrative tribunal, an inquiry which necessitates a consideration of the intricate case law of, primarily, the Tribunal des Conflits. M. Bouffandean's account is of outstanding interest and importance, both because of its intrinsic excellence and because he was himself President of the Tribunal des Conflits between 1947 and 1950.

The difficulty of delimitation is no longer caused by the theory of "acte de gouvernement"—the administration can no longer claim that its act is not cognisable by a court because of the political nature of the act. The question at issue is which tribunal is to have cognisance—the civil or the administrative? The administrative tribunal is judge of the administrative act as such and it alone has

[4] The Assemblée Générale of the Conseil d'Etat must not be confused with the Assemblée Plenière of the Section du Contentieux.

power to annul it; but the ordinary courts may also be competent—for example, if a penal sanction for a decree is sought or exceptionally in case of the protection of (inter alia) an interest in land. Yet even as regards land, a remedy for damage caused by "travaux publics" must be sought in the administrative courts whereas in case of expropriation the civil tribunal has the duty of settling the compensation. It will be seen that very nice questions might here arise, rather similar to the question of the competence of actions of case and trespass: has the owner been unlawfully expropriated, or has he been merely damaged? To meet this situation there was developed the notion of "emprise, mainmise ou entreprise sur propriété privée," this being both necessary and sufficient to give the civil tribunal jurisdiction. Extreme complication, however, arises in the case of illegal requisition. Though the owner is temporarily dispossessed and though the civil tribunal has jurisdiction to assess the price to be paid for the occupation, nevertheless the question of the illegality of the requisition is matter for the Conseil, illegal requisition being evidently the type almost of wrongful act committed by the administration. But here also the civil courts introduced a further refinement by the doctrine of "voie de fait": if the alleged administrative act is so far forth illegal that it cannot be considered as even the attempted exercise of an administrative power, the civil tribunal will treat it as a mere act of violence and give the plaintiff a remedy accordingly.

The doctrines of "voie de fait" and of "emprise" are examples merely of the matters with which M. Bouffandeau has to treat. It is a peculiar intellectual delight (though of a somewhat esoteric sort) to observe the sureness of his approach to such problems and to appreciate the clarity and above all the brevity of his exposition. We see in this article in an especial degree the quality of mind and style which distinguishes members of the Conseil. Still the duality of jurisdictions in France, which adds not a little to the length and complication of legal proceedings, seems to the outside observer an unfortunate complication: even if he is prepared to admit that such a duality and the resulting intricacies are a necessary consequence of the French system, they are nevertheless the obverse of the medal which we sometimes fail to consider when we regard the triumphs of the Conseil d'Etat. This reviewer is prepared to hazard the suggestion that perhaps insufficient consideration has in France been given to the possibility of avoiding these complications, intellectually intriguing as they may be: there is perhaps too much a tendency to accept them as inevitable. It should, however, be remembered that the difficulty of co-ordinating these jurisdictions is much greater than that we experienced in

England in fusing law and equity; for law and equity were always in theory at least complementary, whereas the civil and the administrative jurisdictions in France are entire and independent as well as separate. And it is worth while emphasising again that what is at issue in the cases coming before the Tribunal des Conflits is not *whether* the administrator is to be subject to judicial control, but *which court* will deal with the situation created by his act, the civil or the administrative tribunal.

In an article of equal merit, M. Josse, président de la première sous-section, also deals with the competence of the Conseil d'Etat but from a different aspect; for he considers its jurisdiction not externally *vis-à-vis* the civil tribunal but internally with reference to the methods it has used both to extend its control over administrative acts and to increase the efficacy of that control when exercised. Again what specially merits our admiration is the sureness of the author's approach and the exactitude, clarity and brevity of his exposition of this extremely large subject. We can select here only one matter for mention. The author states (pp. 167–8) categorically (and, if the reviewer may respectfully say so, correctly) when discussing the recours pour excès de pouvoir and the recours en cassation, " il n'y a pas d'ailleurs de différence spécifique entre ces deux branches du contentieux de l'annulation." The implications of this proposition are of the utmost interest to the English lawyer. The recours en cassation is the recourse against a *judicial* decision, the recours pour excès de pouvoir (which is understood in an extremely large sense) is the recourse against the *purely administrative* act. M. Josse's statement means that the Conseil d'Etat's power of control over the administrative act is not bedevilled by the distinction " judicial or quasi-judicial " and " purely administrative " which has been elaborated in our system: a decision in the sense [5] of *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66, J.C., would be unacceptable in France. It must further be appreciated that the control exercised by the recours en cassation is greater in ambit than that provided by certiorari proceedings and indeed that it resembles and in some respects exceeds the powers exercised by our Court of Appeal over county court judgments. That is to say, the Conseil habitually applies to the executive decision, of whatever sort or kind, powers of review similar to those then used by our Court of Appeal. It is only when we have appreciated this that we can begin to form a comparative idea of the extent of the control exercised by the Conseil d'Etat over the purely administrative act in France.

[5] See a most interesting article by H. W. R. Wade [1951] 67 L.Q.R. 103.

The third article by M. Latournerie, président de la troisième sous-section, amounts to an extensive monograph and is of a kind quite different from that of the two just noticed. Though the author writes as a judge and not as a philosopher, he is more concerned with the methodology of the Conseil d'Etat's contentious activity than with a statement of its legal results. He defines his subject-matter as "la technique juridictionelle" of the Conseil d'Etat. He seeks to "dégager quelques-uns des procédés habituels au juge" and to throw some light upon "les façons de penser et d'agir des juges administratifs." M. Latournerie has been inspired principally by Geny, to whose *Science et Technique en droit privé positif* he makes constant reference. Indeed, the author's purpose is to apply to public law the principles enunciated by Geny with reference to private law.

M. Latournerie's article is extremely elaborate: it requires a special degree of effort and attention from the reader, though the effort will be rewarded. The author's exposition is very "nuancé" —he has all the horror of absolute and dogmatic statement which is to be expected from a member of the Conseil; and the distinctions he proposes are fine. But fine distinctions are appropriate to the infinitely complicated topic he has chosen, and they are illuminating. This reviewer found especially helpful the author's comments upon the different character of "*notions*" (including therein "*les catégories*"), "*principes*" and "*constructions*" *juridiques* and particularly his section on their "*qualités exigibles.*" His exposition of the process of judicial analysis and analogy, and especially of the process of deduction, is stimulating and suggestive, and the relevant section, which concludes with an examination of two important recent decisions of the Conseil, is most noteworthy. He proceeds to isolate "deux principes généraux d'une importance particulière, le but et la nécessité publique" and demonstrates their critical influence in shaping the Conseil's case law. But it is in fact impossible in a short review to list even the main points of M. Latournerie's article.

The author steers a fascinating course between "le culte immodérée de la forme" (which we might translate as a House of Lords doctrine of precedent) and "une désinvolture par trop cavalière à l'égard des règles qui la régissent" (which we might translate as the "Realist" school of jurisprudence). His analysis enables us in some degree to seize upon the methods which have made it possible for the Conseil d'Etat's case law to develop and to keep in touch with the actual event whilst remaining a coherent and rational system. His article constitutes a major contribution to a study of the judicial process in a system of case law. The reviewer

must, however, express his extreme disappointment that the author makes no reference to any English or American publications, excepting one quite minor allusion to Maine. Yet the author's interests and object most strongly resemble Cardozo's: indeed his monograph may succinctly be described as an ampler and far more subtle version of the "Nature of the Judicial Process" as it appears in French administrative law. The omission is the more regrettable as a correlation of the English and American theory and practice with those of the Conseil d'Etat is perhaps one of the most valuable topics in the field of comparative law; and it would have been interesting indeed to have the views of a person as well qualified as M. Latournerie on the contrasts and the similarities, and on the lessons to be learned from that comparison. As it is, his article deserves the closest attention from any common-law writer interested in the theory and the technique of case law. We have indeed much to learn from the French in this matter; and they perhaps something from us.

When dealing with a book of such amplitude and importance, a reviewer will always remain aghast at his own omissions; but it is impossible to conclude without at least mentioning the numerous articles which deal with the historical aspects of the Conseil d'Etat. Among them there is a particularly brilliant contribution by Professor Waline, the outstanding academic authority on French administrative law, who in a short note gives a masterly summary of some of the Conseil's most memorable achievements.

Taken as a whole, the *Livre Jubilaire* is in itself a most remarkable publication and the richest possible source of authoritative information concerning an institution which is perhaps the most important modern instrument of government and law.

NOTES ON RECENT CASES

CHARITABLE PURPOSES—MAIN AND ANCILLARY PURPOSES DISTINGUISHED—GIFT OVER AND PERPETUITY RULE

Royal College of Surgeons of England v. *National Provincial Bank* [1952] A.C. 631.

A WIDOW in her will left the income of certain property to the Middlesex Hospital, to maintain an institute which was a department of the hospital; but with a gift over to the college if inter alia the hospital should be nationalised. This action was brought to determine whether the condition precedent to the gift over had been satisfied; and whether the gift over was to a "charity" and so effectual although not restricted to the perpetuity period.

It was held (Lord Cohen dissenting), reversing the Court of Appeal, that the gift over was effective for the following reasons. (i) The hospital had been nationalised within the meaning of the testatrix's language. (ii) A gift over from one charity to another is a valid exception to the perpetuity rule and extends to charitable corporations as well as to charitable trusts, for equity leans in favour of charity generally. (iii) The recitals of the Charters of Incorporation adequately expressed the objects of the college, whereas the operative parts of the charters showed merely how to achieve those objects, namely, "the due promotion and encouragement of the study and practice of the art and science of surgery." (iv) Those objects were charitable in law.

The decision turned on the precise meaning of the word "practice"—was it practical skill or the surgical profession; and despite the interpretation of Romer L.J. in *Re Royal College of Surgeons of England* it was held to be the former. "The promotion of the interests of practising surgeons is an incidental, though an important, and perhaps a necessary, consequence of the work of the college in carrying out its main object, the promotion and encouragement of the study and practice of the art and science of surgery" (*per* Lord Morton of Henryton, at p. 659). The case emphasises that a purpose is not charitable unless its whole scope is charitable; but once this is established it is irrelevant that it may incidentally benefit a profession, which is non-charitable. It is wrong to confuse the purpose of a society with the objects of individuals in joining it. But it may be only by favouring individuals (and maintaining

standards of conduct and restrictive practices) that the charitable purposes and public benefit can be realised at all.

In all these cases one must first ascertain precisely, by construing the document, the settlor's overriding purpose or purposes, and then decide whether those purposes are wholly charitable in law.

D. St. J. R. W.

CONFLICT OF LAWS—CUSTODIAN OF ENEMY PROPERTY—CROWN SERVANTS—CROWN IMMUNITY FROM INCOME TAX

Bank voor Handel en Scheepvaart v. *Slatford and Another* [1953] 1 Q.B. 248 (C.A.).

There have been further proceedings with reference to the case, upon Conflict of Laws (noted *ante*, p. 282), in which the Custodian of Enemy Property had sold certain gold bars which had been deposited in this country by the plaintiff, a Dutch banking company.

In these further proceedings, the plaintiff contended unsuccessfully that the Custodian, being a servant of the Crown, ought not to have paid income tax on the profits which he had made by investing the proceeds of sale.

CONFLICT OF LAWS—JURISDICTION—FOREIGN ORDER—ALIEN DEFENDANT RESIDENT ABROAD—EFFECT

British Nylon Spinners, Ltd. v. *Imperial Chemical Industries, Ltd.* [1953] Ch. 19 (C.A.).

By a contract made on December 31, 1946, the defendants, a company incorporated and domiciled in England, acquired from an American company certain English patents for making nylon and and in March, 1947, they agreed to grant to the plaintiffs exclusive licences thereunder. On July 30, 1952, a United States District Court cancelled the first contract for violating Federal law and ordered the defendants to return the patents. Meanwhile the plaintiffs sought specific performance of the second agreement and an interlocutory injunction to prevent the defendants re-assigning the patents. Upjohn J. granted this injunction.

Dismissing the appeal the Court of Appeal held, first that the judgment of a United States court could not affect British nationals domiciled and resident in England. Secondly, the plaintiffs had a

contractual right to receive the licences and if the first contract were cancelled and the patents returned this right would be frustrated. The plaintiffs were, in effect, owners of English patents and their right was to be protected by English courts. Sir Raymond Evershed M.R. remarked that "the American courts would likewise be slow . . . to recognise an assertion on the part of the British courts of jurisdiction extending (in effect) to the business affairs of persons and corporations in the United States."

The court assumed that the plaintiff and defendant companies were independent of each other and declared that nationality was a proper reason for assuming jurisdiction *in personam*. In fact the United States court did not claim to affect the rights of British nationals domiciled and resident in England and there was no suggestion that it could not deal with the foreign contracts of an American company. Denning L.J. commented that: "As I read this judgment of the United States court, there is a saving clause which prevents any conflict because . . . there is a provision which says that nothing in the judgment shall operate against the company for action taken in complying with the law of any foreign government or instrumentality thereof to which the defendant company is for the time being subject."

D. J. L. B.

CONFLICT OF LAWS—MARRIAGE—CELEBRATED ABROAD—FORMALLY INVALID—SUBSEQUENT VALIDATION—RETROACTIVE EFFECT UPON PARTIES RESIDENT AND DOMICILED IN ENGLAND.

Starkowski v. *Att.-Gen.* [1952] 2 All E.R. 616 (C.A.).

On May 19, 1945, the petitioner's mother, resident in Austria, there married by religious ceremony one Urbanski. A month later a daughter was born. There having been no civil ceremony, by German law then in force, this marriage was void for want of form, but an Austrian order of June 24, 1945, validated such a religious marriage upon registration. After this order and before registration the parties came to England and the mother gave birth to the petitioner, whose father was Starkowski. The marriage was then registered, and afterwards the mother went through a form of marriage with Starkowski. The petitioner sought a declaration of legitimacy through this second marriage which was refused by Barnard J. [1952] 1 All E.R. 495, holding that the marriage to Urbanski was valid.

Confirming this judgment the Court of Appeal held that the law of the place of celebration governs the form of a marriage, *Berthiaume* v. *Dastous* [1930] A.C. 79. Consequently there was "no reason why those who were at the time or later domiciled elsewhere" should be excepted from the Austrian order and therefore even delayed registration validated the first marriage. Retroactive validation of marriages was consistent with English legislation. The facts that the order was made before the parties left Austria and that the parties were domiciled abroad when the marriage was registered, were irrelevant.

Lynch v. *Paraguay Provisional Government* (1871) 2 P. & D. 268, was distinguished. There the statute had been passed retroactively to defeat a succession whereas here the order gave effect to the parties' intentions at the time of their marriage. Without suggesting them the court said that there were other differences. In fact *Lynch's Case* concerned a succession to property, not legitimation or marriage, and the Paraguayan law was confiscatory, hence objectionable to English courts.

D. J. L. B.

CONTRACT—ENTIRE CONTRACT—DOCTRINE OF SUBSTANTIAL PERFORMANCE

Hoenig v. *Isaacs* [1952] 2 All E.R. 176 (C.A.).

The plaintiff agreed to decorate and furnish the defendant's flat for a sum of £750, the terms of payment being "net cash as the work proceeds and balance on completion." Two periodic payments were made and on completion the defendant entered into possession. He then refused to pay the balance due on the ground that, as a wardrobe door, a bookshelf and a bookcase were defective, the plaintiff had failed to perform his contract.

The Court of Appeal, affirming the decision of the official referee, held that there had been substantial compliance with the contract and the defendant was liable for £750 less the cost of remedying the defects. The question, in what was "a borderline case," was one of construction. If the defendant was paying such a large sum only because he intended entire performance to be a condition precedent to payment the court would be bound to follow the old principle of *Cutter* v. *Powell* (1795) 6 Term Rep. 320, that in such circumstances nothing can be recovered while the work remains undone. But if not, the court could apply the principle of

Dakin v. *Lee* [1916] 1 K.B. 566, that fulfilment of every term is not necessarily a condition precedent to payment. The latter principle was followed probably because, as Denning L.J. said, " the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions." The court construed the promise to complete as a term of the contract giving the defendant a right to damages in respect of the omissions but not as a condition giving a right to refuse payment.

It was said *obiter* that had the promise been a condition the defendant's entry into possession would have constituted a waiver. This view seems questionable since a party is only held to affirm a contract where he has an option to accept or reject the work done, and here there was none.

The decision is important in showing that the general presumption in favour of entirety is rebuttable in cases of unimportant misfeasances. In default of an express stipulation for complete performance the doctrine of substantial performance will apply. What is " substantial performance " depends upon the particular contract.

M. M.

CONTRACT—PENALTY—HIRE PURCHASE—FULL BALANCE OF UNPAID INSTALMENTS PAYABLE ON DETERMINATION

Cooden Engineering Co., Ltd. v. *Stanford* [1953] 1 Q.B. 86 (C.A.).

By clause 2 of an agreement for the hire purchase of a car it was provided that the owner could determine the hire for non-performance of any of a number of stipulations, some being breaches of the contract (failure to pay instalments), some not (death, bankruptcy), and that the hirer should thereupon pay the full balance of the unpaid instalments and return the chattel. The hirer fell in arrear. The owner determined the hire and now sued for the full balance. The defendant claimed the payment was a penalty and irrecoverable.

A penalty is a payment imposed *in terrorem*, which is payable on breach of contract and is not a genuine estimate of liquidated damages. Since the court agreed that this sum was penal in amount, the remaining question was whether the payment was in law a penalty. Jenkins L.J. said, " In order to be such, the sum in question must be a sum which the hirer undertakes to pay to the owners in the event of, and in respect of, some breach by the hirer

of the terms of the hire purchase agreement." He argued that since this sum was payable on the determination of the contract, and not in respect of a breach of the contract, it could not be a penalty. He followed the Divisional Court in *Elsey & Co.* v. *Hyde* (1926) and *Chester & Cole* v. *Wright* (1930) reported in Appendix A to Jones and Proudfoot's *Notes on Hire Purchase Law.*

The majority refused to accept this view. Somervell L.J. stated that it was " plainly a sum to be paid in consequence of a breach." Hodson L.J. would not allow a skilful draughtsman thus to evade the law and added: " My difficulty is to see the validity of the distinction between a claim to receive payment for a sum of money because of a right to determine arising from breach of contract and a claim to receive payment of the same sum by reason of breach of contract giving a right to determine."

Thus the majority, while perhaps to some extent interfering with the sanctity of contracts, insisted on regarding the substance and not merely the form of the agreement, adopting a less subtle approach than Jenkins L.J.

G. W. C.

CONVERSION—ESTOPPEL—CONVERSION BY AGENT AFTER TERMINATION OF AUTHORITY—LIABILITY OF THIRD PARTY PURCHASER

Jerome v. *Bentley & Co.* [1952] 2 All E.R. 114.

The plaintiff entrusted a ring to T. for sale on his behalf at not less than £550, T. to retain any surplus. The ring was to be returned after seven days if unsold. Eleven days later, T. claiming to be the owner, sold the ring for £175 to the defendants who bought in good faith and resold it that day. Subsequently T. was convicted of larceny of the ring as bailee.

Donovan J. held the defendants liable for conversion. Any defence based on the ostensible authority of T. as an agent failed, for after seven days T. ceased to be an agent with limited authority to sell. Moreover, it was impossible to speak of the authority usually given to agents such as he. Nor could the defendants rely on the dictum of Ashhurst J. in *Lickbarrow* v. *Mason* (1787) 2 Term Rep. 63, 70, that, " wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it." Subsequent decisions, of which the most important was that of the House of Lords in *Farquharson Brothers & Co.* v. *King & Co.* [1902] A.C. 325, had limited the operation of this principle to cases where one of the

innocent persons had done something to mislead the other. Here it was the act of T., and not of the plaintiff, which had misled the defendants.

It has been argued (see 15 M.L.R. 503) that T. was a mercantile agent and that the Factors Act, 1889, might have provided a good defence. *Weiner* v. *Harris* [1910] 1 K.B. 285 shows that a mercantile agent may act for only one principal, and, in *Budberg* v. *Jerwood and Ward* (1934) 51 T.L.R. 90, Macnaghten J. was of the opinion that only one transaction need be involved. Cases under the repealed Acts support this view. Lush J., however, in *Heap* v. *Motorists' Agency* [1923] 1 K.B. 577, based his decision, at least in part, upon the requirement of a course of conduct to satisfy the definition in section 1. This definition, with its provision " in the customary course of his business as such agent " (the words " his " and " such " are omitted from the similar provision of section 2), would appear to demand the latter interpretation.

J. N.

CRIMINAL LAW—EVIDENCE—ADMISSIBILITY—HEARSAY—PART OF RES GESTAE

Teper v. *The Queen* [1952] A.C. 480 (J.C.).

The accused was charged with maliciously setting fire to his wife's shop with intent to defraud an insurance company. The prosecution called a witness who deposed that after hearing the fire alarm, he heard a woman's voice shouting " your place burning and you going away from the fire," and immediately afterwards saw a car being driven away by a man resembling the accused. The words were spoken some 220 yards from the fire, and about 26 minutes after it had started. It was contended before the Judicial Committee (Lords Normand, Oaksey and Tucker) that this hearsay was inadmissible, as it was not part of the *res gestae*.

The appeal was allowed because of the disparity in time and place between the words spoken and the criminal act, and because they referred not to the act itself, but to something which happened afterwards. For hearsay to be admissible as part of the *res gestae*, it must be, in the words of Lord Normand, " an item or part of real evidence, and not merely a reported statement of it " (a test which justifies the controversial decision in *R.* v. *Bedingfield*, 14 Cox 341). Words sought to be proved by hearsay must be such that examination of the person who spoke them would be unnecessary, because they were created by the crime, not by him. Hence

it is but rarely that hearsay can be admitted for identification purposes, because, as Lord Moulton pointed out in *R.* v. *Christie* [1914] A.C., at p. 558, "Identification is an act of the mind." The speaker's mind has intervened, and performed a conscious act between the observation of the event and the uttering of the words of identification; thus it is highly desirable that such evidence should be given only by the speaker. Hearsay identification evidence should therefore only be accepted where it can be considered as spontaneously produced by the sight of the crime (a condition which proved fatal in *R.* v. *Gibson* (1887) 18 Q.B.D. 537).

Since it was the hearsay alone which connected "the appellant with the man who set fire to a building a furlong away and 26 minutes earlier," the Board had no difficulty in rejecting the specious contention that its inadmissibility did not seriously weaken the case against him.

E. W. C.

CRIMINAL LAW—EVIDENCE—SIMILAR FACTS—ADMISSIBILITY

Harris v. *Director of Public Prosecutions* [1952] A.C. 694.

The appellant had been convicted on the last of eight counts alleging thefts in similar circumstances. Separate trial of the eighth count had been refused and evidence on all the charges admitted together. The House of Lords (Viscount Simon, Lords Porter, Morton of Henryton and Tucker; Lord Oaksey dissenting) allowed the appeal because the jury had not been warned that evidence on the earlier counts did not in itself confirm the last.

Their Lordships pronounced on the line of cases from *Makin* v. *Att.-Gen. for New South Wales* [1894] A.C. 57, to *R.* v. *Hall* [1952] 1 K.B. 302 (11 C.L.J. 290). Two principles governing the admissibility of similar fact evidence were stated by Viscount Simon. First, the principle laid down by Lord Herschell in *Makin's Case* remains the proper one to apply, although it is "an error to attempt to draw up a closed list of the sort of cases in which the principle operates." "The substance of the matter," he said, "appears to me to be that the prosecution may adduce all proper evidence which tends to prove the charge. I do not understand Lord Herschell's words to mean that the prosecution must withhold such evidence until after the accused has set up a specific defence which calls for rebuttal." However, "evidence of similar facts involving the accused ought not to be dragged in to his prejudice without reasonable cause." The second proposition is that an

overriding discretion is vested in the judge to exclude evidence, even though technically admissible, if "its probable effect would be out of proportion to its true evidential value."

Viscount Simon did not understand *R.* v. *Sims* [1946] K.B. 531 to have been enlarging the principle in *Makin's Case* and approved Lord du Parcq's construction of *Sims* in *Noor Mohammed* v. *R.* [1949] A.C. 182. Yet his paraphrase of Lord Herschell's principle, as cited above, adopts the same ("inclusionary") approach as Lord Goddard in *Sims*, substituting "proper evidence which tends to prove the charge" for "evidence that is logically probative." This shows the absence of any real conflict, except of emphasis, between the two approaches.

"Proper evidence" and "reasonable cause" may need elaboration and moreover the judge's discretion will be decisive in each case. The principles, however, are authoritatively stated, even if, as Lord Oaksey's dissent illustrates, their application may not always be as straightforward as the C. C. A. found it in *R.* v. *Straffen* [1952] 2 Q.B. 911. (See 69 L.Q.R. 80 *et seq.*)

J. W. E.

CRIMINAL LAW—INSANITY—M'NAGHTEN RULES—MEANING OF "WRONG"

R. v. *Windle* [1952] 2 Q.B. 826 (C.C.A.).

WINDLE killed his wife by giving her aspirin tablets. The defence at assizes was that he was insane in that though he knew the act was legally wrong yet, through disease of the mind, he believed it morally justifiable. Devlin J. held this did not amount to evidence of insanity to be left to the jury and Windle was convicted of murder.

The Court of Criminal Appeal (Lord Goddard C.J., Jones and Parker JJ.) upheld the conviction. The court reviewed the M'Naghten Rules: "To establish a defence on the ground of insanity, it must be clearly proved that . . . the party accused was labouring under such a defect of reason . . . as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong." Lord Goddard referred to *R.* v. *Rivett* (1950) 34 Cr.App.R. 87, in which he had said: "If a man knows that what he is doing is wrong—and by 'wrong' is meant contrary to law—he is responsible," and added: "courts of law can only distinguish between

that which is in accordance with law and that which is contrary to law."

Counsel had argued that the words " did not know he was doing what was wrong " meant morally wrong, and cited Lord Reading in *R.* v. *Codere* (1916) 12 Cr.App.R. 21: " The standard to be applied is whether according to the ordinary standard adopted by reasonable men the act was right or wrong." This notion of moral guilt is considered in *Kenny*, 16th ed., p. 69, but the C. C. A. has now stated: " It would be an unfortunate thing if it were left to juries to consider whether some particular act was morally right or wrong. The test must be whether it is contrary to law." In this case Windle knew what he did was contrary to law and that was sufficient.

Although the M'Naghten opinion says: " . . . notwithstanding the party accused . . . under the influence of insane delusion," the argument that the rules only applied to delusions was not accepted, and they were held to apply whatever the nature of the insanity or disease of the mind from which the accused is suffering.

Finally, the " strong line " of Devlin J. in not leaving the question of insanity to the jury was approved on the general principle that no decision should be left to them where there is no evidence as understood by the law.

D. G. V.

DONATIO MORTIS CAUSA—CONDITIONAL NATURE—DELIVERY OF SAFE KEYS—SUFFICIENCY OF DELIVERY OF CONTENTS

Re Lillingston, Pembery v. *Pembery and Another* [1952] 2 All E.R. 184.

Six days before her death, the deceased, who had deliberately excluded her jewellery from her will, told Mrs. Pembery that she was " done for," and, shortly afterwards said to her, " I am going to give you all my jewellery. I am giving you my key to the safe deposit at Harrods and when I am gone you can go and get the jewellery." The deceased handed over the key to her trunk containing the key to this Harrods' safe, explaining that this safe contained the keys to another safe in the City. The key to the trunk was kept by Mrs. Pembery, who was informed that it was then hers. After the death, both safes were found to contain jewellery, the key to the City safe having been discovered in the safe at Harrods.

The validity of the gift was challenged on two grounds: (i) that a *donatio mortis causa* must be made upon the condition that it is to operate only if the donor dies, but that here the donor never contemplated recovery so that the gift was made *because the donor knew she would die*; (ii) that the delivery of the key to the Harrods' safe was not a sufficient delivery of its contents, since the contract with Harrods required the deceased's written authority.

As to (i) Wynn-Parry J. found that, on the evidence, it was not certain on the particular date that the deceased would die within a few days, although she thought she was near her end; the gift was therefore sufficiently conditional (*Lord Advocate* v. *M'Court* (1893) 20 R. (Court of Session) 488, distinguished). As to (ii), it was held that, despite the lack of written authority, the delivery of the key to the Harrods' safe conferred a partial dominion over the contents of that safe and also over those of the City safe, since the keys to the latter were found in the former (*Gardner* v. *Parker* (1818) 3 Madd. 184, *Re Mustapha* (1891) 8 T.L.R. 160, and *Re Wasserberg* [1915] 1 Ch. 195, discussed and followed). He therefore made a declaration that there was a valid *donatio mortis causa* of all the jewellery in favour of Mrs. Pembery, subject to payment of debts and death duties, leaving open the question whether an effective gift might be made when death is inevitable in the immediate future.

P. R. H. W.

GIFT INTER VIVOS—IMPERFECT GIFTS—UNREGISTERED TRANSFER OF SHARES—BENEFICIAL INTEREST PENDING REGISTRATION

Re Rose, Rose v. *Inland Revenue Commissioners* [1952] Ch. 499 (C.A.).

The decision of Roxburgh J., noted *ante*, p. 296, has been affirmed by the Court of Appeal. The rule in *Milroy* v. *Lord* (1862) 4 De G.F. & J. 264, to the effect that attempted gifts are wholly inoperative, even in equity, unless everything has been done which is necessary for the transfer of the property, does not apply if the donor has done all that is necessary to be *done by him*. Thus if, as in *Milroy* v. *Lord*, the donor merely executes a document which is not the appropriate form of transfer for the shares which he is attempting to give, his attempted gift fails entirely. In the present case, however, the donor had done all that was necessary to be done by him: he had executed a document which was precisely appropriate for transferring to the donee his entire property in the

company shares concerned; and he had delivered to the donee this document, together with the relevant share certificate. Accordingly, although by law the legal title to the shares would remain in him until such time as the company should register the transfer, the beneficial interest in the shares had passed at once to the donee: the donor, therefore, held the legal title upon trust for him.

INTERNATIONAL LAW—SOVEREIGN IMMUNITY—FOREIGN SOVEREIGN AS PLAINTIFF—SUBMISSION—EXTENT—SUBSEQUENT PROCEEDINGS BY WAY OF APPEAL.

Sultan of Johore v. *Abubakar, etc.* [1952] A.C. 318 (J.C.).

In 1942 the Japanese military administration in Singapore set up, in place of the old Supreme Court, a High Court exercising a similar jurisdiction. In 1945 this court held that two deeds executed by the Sultan of Johore in respect of some land in Singapore were void and that the Sultan was beneficially entitled to the properties. After the reoccupation of Singapore, an Ordinance was enacted there in 1946, providing, inter alia, that any person aggrieved by a decision of the Japanese court could apply to the court to have it set aside or to obtain leave to appeal against it. The respondents took out an originating summons under the Ordinance, claiming to have been aggrieved by the above decree. The Sultan claimed that as he was an independent sovereign the court had no jurisdiction over him.

The Privy Council held that the appellant was recognised by His Majesty's Government at the relevant time as an independent sovereign. But as the procedure authorised was in the nature of an appeal and not a new and distinct proceeding, " his original submission to the original court binds him to accept the jurisdiction on appeal."

Of great interest is the question whether the general rule that a foreign independent sovereign is immune from legal process is subject to any exception in the case of proceedings concerning the title to immovable property within the jurisdiction. Without deciding the point, the Board did not consider " that there has been finally established in England any absolute rule that a foreign independent sovereign cannot be impleaded in any circumstances." Support for a more restrictive interpretation of the rule could be found in *Larrivere* v. *Morgan* (1872) L.R. 7 Ch.App. 550. Further, in *The Cristina* [1938] A.C. 485 the majority of the House of Lords had

expressed doubts as to whether foreign public ships engaged in ordinary commerce enjoyed jurisdictional immunities.

The decision thus leaves open the question whether the principle of sovereign immunity extends to disputes concerning immovable property. That the latter form an exception in international law has been expressed in a number of dicta of various courts, though the actual decisions are few and inconclusive. The view has, moreover, the support of writers of authority.

C. H. W.

LICENCE—WHETHER AN EQUITABLE INTEREST IN THE PROPERTY—DESERTED WIFE'S RIGHT TO REMAIN IN MATRIMONIAL HOME

Vaughan v. *Vaughan* [1953] 1 W.L.R. 236 (C.A.).

THE plaintiff owned a house where he lived with his wife until he deserted her in 1948. In 1950 the wife was granted a divorce on the grounds of his adultery. The husband later brought an action against her for possession of the house and the county court judge held: (1) after a divorce, a wife could no longer rely on the irrebuttable presumption of law that her licence to occupy the matrimonial home was irrevocable: *Bendall* v. *McWhirter* [1952] 2 Q.B. 466; (2) nevertheless, she had a contractual licence to live there indefinitely, since the husband, on leaving her, had said she could live there always.

The Court of Appeal, in reversing this decision on the second point and without pursuing the matter of consideration, held that the husband's statement, without more, could not have been intended, or understood, to have any contractual effect and, therefore, the wife's licence was revocable by notice or the issue of a summons.

This case follows a number of recent decisions in the Court of Appeal on the wife's so-called irrevocable licence to occupy the matrimonial home—based *semble* on the husband's inability to sue his wife in tort—in the course of which the question whether an irrevocable licence creates an equitable interest has been examined. In *Bendall* v. *McWhirter*, Denning L.J. had said that the wife's licence, revocable only by an order of the court made under the Married Woman's Property Act, 1882, s. 17, which governs property rights between husband and wife, is indistinguishable from a contractual licence. The learned Lord Justice, in the earlier case of *Errington* v. *Errington* [1952] 1 K.B. 290, in which his

reasoning was accepted by Somervell L.J., had described a contractual licence as an equitable right valid against the licensor and all claiming through him, except a purchaser for value without notice: such a licence being revocable only in accordance with the terms of the contract. He re-examined the wife's right in *Bendall* v. *McWhirter*, where his conclusion was that it is an interest valid in equity against the licensor's successors in title who take with notice: it is not a legal interest but a clog or fetter like a lien. Clearly, in Denning L.J.'s view, an irrevocable licence is an equitable interest.

On the other hand, Romer and Somervell L.JJ., in *Bendall* v. *McWhirter*, expressly stated that the wife's licence is not a legal or equitable interest in the home, but is a mere clog or fetter on the beneficial ownership, enforceable against the husband's trustee in bankruptcy because (by virtue of the bankruptcy law) the trustee gets no better rights in the property than the debtor had.

In view of this apparent conflict of opinion, it is to be hoped that the House of Lords will have an early opportunity of considering this question and finally settling whether or not a new equitable interest in land has arisen. This subject has been examined exhaustively in three recent articles: by Dr. G. C. Cheshire in 16 M.L.R. p. 1, by Mr. H. W. R. Wade in 68 L.Q.R. p. 337, and by Mr. R. E. Megarry in 68 L.Q.R. p. 379.

D.W.C.

MISTAKE—OVERPAYMENT OF MONEY UNDER MISTAKE OF FACT—RENT ON LONG LEASE—INSUFFICIENT TAX DEDUCTION

Turvey v. *Dentons* (*1923*), *Ltd.* [1953] 1 Q.B. 218.

The secretary of a company which held a 99-year lease failed to inform the company's accountant of the true length of the lease. The latter, believing that the lease was for only 10 years, and therefore not a long lease within Finance Act, 1940 s. 13 (1) (now Income Tax Act, 1952, s. 172 (1)), when paying the rent due, deducted tax at a rate below that which was applicable. On discovering his error, the company withheld subsequent payments to recoup themselves. The lessor sued to recover the rent withheld, and the company counterclaimed for refund of the previous overpayments.

Pilcher J. held that the accountant's mistake was a mistake of fact, and gave judgment for the company. He quoted *Lamb* v. *Brewster* (1879) 4 Q.B.D. 607, and dicta in *Ord* v. *Ord* [1923] 2 K.B. 432, 445, as showing that deduction of tax was not meant

to be an exclusive remedy: thus, although the lessor was entitled to full payment of rent less tax, the company was not debarred from recovering the amount overpaid merely because of an initial failure to make the correct deduction. The cases which suggested a different conclusion were instances of payments made either under a mistake of law or with full knowledge of the facts.

His Lordship held further, that the secretary's knowledge of the true facts could not be imputed to the company so as to nullify the accountant's mistake, and to prevent the company from recovering. Means of knowledge were not here equivalent to knowledge itself, and the possible carelessness of the accountant was immaterial as a cause of his mistake (see *Kelly* v. *Solari* (1841) 9 M. & W. 54, and *Anglo-Scottish Beet Sugar Corporation* v. *Spalding U. D. C.* [1937] 2 K.B. 607). There was, therefore, no ground for denying to the company the general remedy of those persons who had paid money under a mistake of fact.

Strict reliance on previous authorities meant that the relation of mistake to a quasi-contractual action for the recovery of money paid was not considered as exhaustively as might have been wished. Must a plaintiff in an *indebitatus* count show the type of mistake which would render a contract null *ab initio*, or is there a completely different set of rules which will allow him to succeed if he proves any mistake of fact?

H. W. D. S.

PROFIT À PRENDRE—PRESCRIPTION ACT—ACQUIESCENCE IN INTERRUPTION—USER AS OF RIGHT

Davies v. *Du Paver* [1953] 1 Q.B. 184 (C.A.).

In 1949 the defendant bought the alleged servient tenement and commenced fencing his boundaries. The plaintiff, a neighbouring farmer, complained, maintaining that he and his predecessors had been accustomed to graze their sheep on a portion of that land for over 60 years. Until August 2, 1950, correspondence passed between the parties' solicitors, the plaintiff intimating that he would take legal action. Thereafter, however, the plaintiff neither protested nor took legal action until September, 1951, when he issued a summons against the defendant.

The first question which arose was whether the plaintiff's year of inaction was fatal to his prescriptive claim. Under sections 1 and 4 of the Prescription Act, 1832, the claimant cannot prescribe for a profit if he has "submitted to or acquiesced in" an interruption for one year after notice thereof. The county court judge following

Glover v. *Coleman* (1874) L.R. 10 C.P. 108, held that this is a question of fact, and found that the conduct of the plaintiff did not amount to submission or acquiescence.

On appeal, Birkett and Morris L.JJ. held that the county court judge had not misdirected himself on this point. Morris L.J. considered that there was evidence of a continuing non-submission throughout the period of inaction in view of the strong protests before it and the resulting litigation. Singleton L.J., on the other hand, failed to understand how the county court judge could have found non-acquiescence on the facts: the plaintiff must be deemed to have submitted to the interruption by his failure to act for a year.

However, all three judges decided that the claim must fail on another ground. Relying on the decision in *Sturges* v. *Bridgman* (1879) 11 Ch.D. 852, they held that user *as of right* can never be established unless the servient owner has knowledge or means of knowledge of the enjoyment. The fact that the enjoyment was within the common knowledge of neighbouring farmers was not conclusive of the defendant's knowledge. Singleton L.J., indicating the remoteness of the land in question, held that constructive knowledge normally imputed to a reasonable landowner was not imputable to the defendant.

This decision emphasises that a failure, during the statutory year of interruption, to take legal action or to resort to self-help is not necessarily a "submission" to the interruption. For the first time it is held that a year of inaction does not inevitably defeat a claim under the Act, and that previous protests may notionally continue into that year. Furthermore, the decision demonstrates that prescriptive rights are based on acquiescence and that such cannot be inferred if the servient owner had neither actual nor constructive notice of the enjoyment.

W. H. B.

TORT—CHILDREN TRESPASSING—IMPLIED LICENCE

Edwards v. *Railway Executive* [1952] A.C. 737.

The appellant, a child of nine, was attempting to cross an electrified railway line after looking for his ball when he lost his footing and fell partially on the electric rail and partially over the track. His arm was severed by an oncoming train. In this area the railway ran on an embankment at the foot of which was a children's playground. In accordance with the Railway Clauses Consolidation Act, 1845, the respondents had erected a wire fence which, though

frequently repaired, did not prevent the children from entering to play on the embankment, which they often did.

The House of Lords unanimously upheld the Court of Appeal's finding that there was no evidence of an implied licence. In giving judgment, Lord Porter held that where the facts might indicate trespass it is incumbent upon the plaintiffs to establish a licence. Knowledge on the part of an occupier that a portion of the public habitually trespass on his premises is not alone sufficient evidence of licence, but if knowledge is coupled with failure to give any indication of his disapproval the occupier's consent may be assumed. He need not go to all possible lengths to prevent the intrusion under pain of an implied licence. Lord Oaksey based his judgment on the principle that one who knows that he has no right to enter cannot be a licensee.

Their Lordships dealt with a claim that there had been negligence on the part of the engine driver by holding that in these circumstances, also, wilful or reckless conduct would be necessary to breach the duty owed to a trespasser.

Their Lordships felt that this case was governed by *Addie & Sons, Ltd.* v. *Dumbreck* [1929] A.C. 358, but it would appear that the present formulations of the law go further in limiting the scope of the principle of *Cooke* v. *Midland Great Western Ry. of Ireland* [1909] A.C. 229. The effectiveness of the occupier's measures is not a consideration in determining whether he has expressed disapproval. It seems that their Lordships consider knowledge of habitual intrusion an essential element of any implied licence. On that basis it is doubtful whether cases in which the occupier has on his land something that is undoubtedly alluring but is unaware that there has actually been trespass would be governed by *Cooke's Case*. If not, the age of intruding children seems relevant only in considering what constitutes an indication of disapproval.

F. G. R.

TORT—MASTER AND SERVANT—NEGLIGENCE—SERVANT HUSBAND OF PLAINTIFF—SERVANT'S IMMUNITY FROM LIABILITY NO DEFENCE TO MASTER.

Broom v. *Morgan* [1952] 2 All E.R. 1007.

The defendant employed the plaintiff and her husband to manage a public-house. Set in the floor behind the bar was a trapdoor which covered a lift-shaft. The plaintiff, on going behind the bar, fell through the trap-door which her husband had left open, and was injured.

The plaintiff asserted that the defendant had negligently failed to provide a safe entrance to the place where she was employed, but this allegation was not pressed. The plaintiff also alleged that the defendant was vicariously liable for her husband's negligence. The defendant conceded that the plaintiff's husband had been negligent, but pleaded that since the plaintiff had no remedy against her husband she also had no remedy against her husband's employer. This defence was not accepted, following the decision in *Smith* v. *Moss* [1940] 1 K.B. 424, wherein the defendant as principal was held liable for an injury inflicted by the plaintiff's husband who was held to be acting as the defendant's agent.

This case is particularly interesting because Lord Goddard C.J., who delivered judgment, said that his view of the cases concerning vicarious liability was that the master was liable for the torts of his servant because the act of the servant was equally that of the master. Lord Goddard C.J. did not say whether a husband was incapable of committing a tort against his wife, or whether he was merely immune from his wife's suit. He based his judgment on the duty of the master to take care, citing *Bartonshill Coal Co.* v. *Reid* (1858) 3 Macq. 266, and on the fact that one who would otherwise be liable for another's tort cannot shelter behind that other's personal immunity: compare *Dickinson* v. *Del Solar* [1930] 1 K.B. 376, which was not cited. On this view, which also appears to be accepted in the United States, the master's liability does not depend on that of the servant and so it is no defence for the master that his servant is immune from liability. Lord Goddard C.J. acknowledged his indebtedness to the *Law Quarterly Review* for help in this research.

Lord Goddard C.J. added that had the doctrine of Common Employment not been abandoned, it would probably have served as a defence in this case, since under this doctrine the master would not have been liable to the plaintiff for the negligence of a fellow servant in the course of his employment.

[This judgment has been upheld on appeal [1953] 2 W.L.R. 737.]

S. T. C.

TORT—NEGLIGENCE—INJURIES TO FIREMAN—INVITOR-INVITEE

Merrington v. *Ironbridge Metalworks, Ltd., and Others* [1952] 2 All E.R. 1101.

The plaintiff, a fireman, was injured by an explosion during a fire at the defendants' factory, caused by large quantities of aluminium and carbon dust which had accumulated throughout the building.

At Salop Assizes, Hallett J., emphasising that his decision was

confined to the facts and did not purport to cover firemen generally, doubted whether section 28 (1) of the Factories Act, 1937, could apply to firemen fighting a fire. He held that the plaintiff was an invitee, because the fire brigade had been summoned by the second defendant, the factory manager, but that he could not recover on that ground because there was no evidence to show that, had he been aware of the danger, he would have avoided it. It is submitted that the fact that the fire service was called in by the manager was immaterial to the invitation: the duty of the firemen to enter would have arisen even if they had been summoned by a passer-by and there still is, on the occupier's part, both an interest in their entry and at least an implied consent to it. No doubt Hallett J. was right in being unwilling to decide the case on the narrow ground that there had been an express summons by the manager; but seeing that the plaintiff was (and ought, it is submitted, in any event to have been) an invitee it is odd that his claim as such was defeated by a consideration of what might have happened if he had been told of a danger which was in fact unknown to him.

The defendants were, however, held liable for negligence within the well-known dictum of Lord Atkin in *Donoghue* v. *Stevenson* [1932] A.C. 562 at p. 580, since by lack of reasonable care they were maintaining a grave danger of fire and explosion, and they ought to have foreseen that, if a fire occurred, firemen were likely to enter the premises, thereby being exposed to risk of serious injury. *Volenti non fit injuria* was no defence, for the plaintiff was not even *sciens*; even if he were, he could not be said to be *volens*, since he was acting under compulsion of duty.

Perhaps the most interesting feature of the case is the application of the test of duty laid down in *Donoghue's Case* to a situation in which one might have thought that another branch of the law could have been invoked, *viz.*, that governing liability for dangerous chattels. The orbit of *Donoghue* v. *Stevenson* has tended to become somewhat limited in recent years, and the view that the courts will take of this application of it is to be awaited with interest.

G. J. B.

TORT—NEGLIGENCE—INJURY TO HUSBAND—INTERFERENCE WITH CONSORTIUM—LIABILITY TO WIFE

Best v. *Samuel Fox & Co., Ltd.* [1952] A.C. 716.

The decision of the Court of Appeal (noted *ante*, p. 299) to the effect that a wife has no right of action, based upon her loss of

consortium, against one whose negligence caused injury to her husband, has been affirmed by the House of Lords.

TORT—NEGLIGENCE—NERVOUS SHOCK—FORESIGHT OF INJURY

King and Another v. *Phillips* [1952] 2 All E.R. 459 (Q.B.D.); [1953] 2 W.L.R. 526 (C.A.).

The defendant backed his taxi-cab into a small boy on a tricycle, injuring him slightly. The child screamed, causing his mother in a house some 80 yards away in a side street to look out. She saw the tricycle under the taxi but could not see the child. Fear for his safety caused nervous shock and illness resulted. She now sued on her own behalf and on behalf of the child. The defendant admitted liability *vis-à-vis* the child but denied that he owed the mother any duty.

McNair J. awarded the child £15 but upheld the defendant's contention with regard to the mother's claim although the shock she suffered was the direct result of what she saw and heard. The learned judge applied the test of "reasonable foresight of injury" laid down by the House of Lords in *Bourhill* v. *Young* [1943] A.C. 92 (noted by Prof. Goodhart in 8 C.L.J. (1944) 265–273) and reached the conclusion that neither the defendant nor any reasonable man could have anticipated that collision with a tricycle would result in any injury to a person in a house so far distant. His lordship pointed out that in *Hambrook* v. *Stokes* [1925] 1 K.B. 141 the duty was admitted and that in so far as the legal principles there enunciated conflicted with those in *Bourhill's Case* they must be regarded as overruled.

The Court of Appeal affirmed the decision. The relative extent of the areas of risk of physical and emotional injury was discussed by Denning L.J. He considered that they were co-extensive and that fear of personal physical injury is necessary before damages can be recovered for nervous shock save where the shock is induced by fear of injury to a close relation, *e.g.*, a husband or a child. On this view English law goes further than the American decision of *Waube* v. *Warrington* (1935) 216 Wis. 603 (discussed by Prof. Goodhart in 16 M.L.R. where at p. 14 this whole problem is considered), which decides that these areas are in every case coterminous.

It is submitted that fear of personal injury and even kinship to a threatened third party are irrelevant matters and that an action should lie wherever foreseeable emotional injury is inflicted. Why should a bystander who suffers emotional injury by seeing an

accident not recover merely because he is not personally in danger if it was probable that he would suffer such injury?

M. J. W.

TRUST—NON-CHARITABLE UNCERTAIN PURPOSES—TRUST INVALID

Re Astor's Settlement Trusts [1952] Ch. 534.

By a settlement made in 1945 trustees were directed to apply the income of substantially all *The Observer* shares for non-charitable purposes, not infringing the perpetuity period. These purposes included "the maintenance of good understanding between nations" and "the preservation of the independence and integrity of newspapers." The trust fund after the specified period was to be held absolutely for the younger of those two persons who should be then holding certain offices.

Roxburgh J. applied the dictum of Lord Parker in *Bowman* v. *Secular Society* [1917] A.C. 437, 441—"A trust to be valid must be for the benefit of individuals . . . or must be in that class of gifts for the benefit of the public which the courts in this country recognise as charitable . . ."—and held the trusts invalid. He further held that, even if he was wrong on this point, the trusts failed for uncertainty.

The first ground of the decision is of considerable difficulty. His lordship thought that the "tombs" and "animal" cases, such as *Re Dean* (1889) 41 Ch.D. 552 were "exceptional" and did not impeach Lord Parker's proposition (*infra*). In the *Re Dean* line of cases "there were persons interested in residue who having regard to the decree made would have had no difficulty in getting the terms of the 'bequest' enforced" (at p. 543), whereas in the case before him there was no one who could initiate proceedings against the trustees.

It is suggested with the greatest respect that the beneficiaries under the resulting trust in *Re Astor* were in the same position *qua* the settlement as was the residuary legatee *qua* the bequest in *Re Dean*.

It is further submitted that although *Re Astor* cannot thus be distinguished from the *Re Dean* type of case a valid distinction does exist, a distinction which may be found in the words of Grant M.R. in *Morice* v. *Bishop of Durham*, 9 Ves. 399, 405. "Every other trust (*i.e.*, non-charitable trusts) must have a definite object. There must be somebody, in whose favour the court can decree performance." Whereas the beneficiary or the purpose in the "tombs"

and " animal " cases were definite, the beneficiaries—the non-charitable purposes—in *Re Astor* were not. The court cannot decree performance in favour of an unascertainable beneficiary. *Re Wood* [1949] Ch. 498 is similarly distinguishable.

That the position of the unenforceable trust is anomalous is not to be denied. Higher authority would be welcomed to resolve the existing uncertainty.

G. H. J.

WILL—LAPSE EXCLUDED BY WILLS ACT, 1837, S. 33—WHETHER DEVOLUTION AS AT NOTIONAL OR ACTUAL DATE OF LEGATEE'S DEATH.

Re Basioli [1953] 2 W.L.R. 251.

A TESTATRIX made her will in 1923 leaving certain property to her children. In 1929 one of her daughters died intestate, leaving issue (a son). In 1937 the testatrix's husband died; in 1939 the deceased daughter's husband died; in 1940 the testatrix died; and in 1949 the deceased daughter's son died under 21 years of age and unmarried. Thus the bequest to the daughter was saved in that her son outlived the testatrix, for by section 33, Wills Act, 1837, " such a bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator."

But although the bequest had not lapsed, who was to take the gift? That depended on whether the persons interested under the daughter's intestacy were to be ascertained as at the date of her death in 1929, or as though she had survived the testatrix and died immediately after her in 1940; for, if the former, the estates of the two husbands would participate, whereas, if the latter, the daughter's sisters and brother were entitled.

Upjohn J. held the former on the ground that section 33 on its true construction was aimed solely at preserving the gift in the parent's will. The words " but shall take effect as if the death of such person had happened immediately after the death of the testator " were put into the section solely to explain the preceding phrase that " such a bequest shall not lapse," and were not intended to mean that the predeceasing child should be treated for all purposes in relation to the gift as surviving the testator. In the course of his judgment, he reviewed all the cases on this topic including *Re Hensler* (1881) 19 Ch.D. 612, and placed particular reliance on *Re Hurd* [1941] Ch. 196.

The present decision involves the rejection of what has been termed the "wide view" of section 33 in favour of the narrow view, and perhaps this is to be preferred. The object of the statute was to prevent certain types of gift from lapsing, and to achieve this it supposes an artificial date of death. But once that object is achieved, the operation of the section should be exhausted; and to regard the child as having survived the testator for any other purpose unnecessarily extends the fiction.

J. D. M.

BOOK REVIEWS

Kenny's Outlines of Criminal Law. An entirely new edition by J. W. Cecil Turner, m.c., m.a., ll.b. of the Middle Temple, Barrister-at-Law, Fellow of Trinity Hall, Cambridge. [Cambridge: at the University Press. 1952. liii, 561 and (index) 14 pp. £2 2s. net.]

In 1902 the first edition of this book was greeted in another place with the cautious remark, "We think that Dr. Kenny is wrong in considering that any excuse is necessary for embodying in the form of a book the lectures on criminal law which he has delivered at Cambridge during the past quarter of a century." It is with no such reserve that 50 years later we hail the entirely new edition of this now celebrated work produced by Mr. Turner. True, the familiar handbook has become transformed into a legal "tome." But in fact the length of the text has grown by less than a third (and to get even an outline knowledge of a subject the knowing student will read a longer work in preference to an epitome) and, of course, the gains are immense.

Mr. Turner's task has been splendidly accomplished. It would be fascinating to attempt to analyse his contribution by detailed comparison of this edition with Kenny's own last edition published in 1929. Apart from limitations of space, we feel that such an approach would tend to miss the real value of the achievement, the production of a book which combines the wisdom and breadth of outlook of the original author with the exceptional acumen of his former pupil, embodies their cumulative teaching experience over a period of 75 years, and displays a resulting unity and value of its own.

What are the outstanding characteristics of this new work? We think they are four.

First, clarity. The old difficult introductory chapter seeking to define a crime has been relegated to the first of the valuable appendices and replaced with a short historical outline leading to a "broadly accurate" description of a crime which serves to start the student on his road without discouraging him with the difficulties of juristic definition at the outset. And how surely his path is signposted! Two instances will suffice. We doubt whether the distinction between larceny by a servant and embezzlement has ever been more neatly stated: "The dishonest servant commits larceny of the chattel which he takes *out* of his master's possession, but embezzlement of the chattel which he intercepts *before* it has reached his master's possession" (p. 209). The lines between

larceny by a bailee, fraudulent conversion, and obtaining by false pretences are marked out with striking simplicity (p. 273).

Secondly, devotion to principle. In following the evolution of rules as to crimes Holmes's aphorism is more than usually apposite: "The life of the law has not been logic: it has been experience." But deviation from settled principle leads to injustice and chaos. The search for principle in this book is as unflagging as the discovery of it is successful and refreshing and the criticism of decisions diverging from principle pointed and trenchant. Even for the student we think such criticism is right. He must be able, as Mr. Turner says, to distinguish the good from the bad and the better from the good, and later he will learn that in the development of the law the critical opinion of the profession counts for much. How often in practice does prosecuting counsel seek to rely on *R.* v. *Sims* [1946] K.B. 531?

Thirdly, realism. In several branches of the criminal law the sooner the student understands that experience has broken down logic, and search for principle must give way to finding and applying the particular rule laid down by the courts, the easier and more practical his task will be. An example of this is to be found in the treatment of the requirements of *mens rea* in statutory offences. "It is not possible to formulate any general principle by which to decide to what extent *mens rea* is a constituent in statutory offences. Students must remember that the first essential is to examine carefully the words of the statute itself, and then if no guidance can be obtained from authoritative interpretations of them given by the courts they should employ the ordinary principles of construction, remembering first that there is a strong presumption that there is no liability for the consequences of *involuntary* conduct and second that there is still a presumption, although a weaker one, that common law *mens rea* is required." Let no advocate attempt to steer his bark through the swift-moving cross-currents of a Divisional Court engaged in considering the degree of knowledge required to constitute "permitting" without being quite sure which particular section of the Road Traffic Act is being dealt with (contrast *Evans* v. *Dell* (1937) 53 T.L.R. 310 with *Lyons* v. *May* [1948] 2 All E.R. 1062).

Fourthly, erudition. There is nothing lacking here. The student moves from the Year Books to the Sessions Papers, from the State Trials to the latest cases reported in the All England Reports—the learning of them all is at his disposal. And Kenny's own delightful felicities of illustration are preserved.

We intend no disparagement if we hazard a few suggestions for the next edition which the bewildering output of modern law reporting will eventually necessitate. The law of manslaughter may be unsatisfactory, but the standard direction to the jury in motor manslaughter cases laid down in *Andrews* v. *D. P. P.* [1937] A.C. 576 should at least be stated. Mr. Turner's individual and

we think irresistible treatment of what constitutes *actus reus* in the offence of attempting to commit a crime would benefit by the inclusion of his own suggested definition: "The *actus reus* of an attempt to commit a specific crime is constituted when the accused person does an act which is a step towards the commission of that specific crime, and the doing of such act cannot reasonably be regarded as having any other purpose than the commission of that specific crime" (Modern Approach to Criminal Law, p. 279). Lord Hewart's dicta in *R.* v. *Baldwin* (1925) 133 L.T. 191, would hardly persuade a chairman of quarter sessions, let alone an assize judge, that a person accused of a sexual crime had put in issue his character *or* his credit (and for this purpose we see no distinction between them) by merely giving in chief his status as a married man. It might be of value to note that the statutory anomaly whereby the "age defence" available to a person under 24 charged with carnal knowledge of a girl under 16 is not available if he is charged on the same facts with indecently assaulting her is met on at least one circuit by refraining from inserting in the indictment any alternative count for indecent assault where the accused is of an age to raise this defence to the count for carnal knowledge. The right of the defence afforded by section 42 (2) of the Criminal Justice Act, 1948, to make two speeches in certain circumstances at summary trial before justices should be inserted at p. 460.

Two recommendations we make with confidence. Statutes should be uniformly referred to not by their regnal years and chapters but by their short titles. The subject index, as in the vast majority of legal textbooks, should refer to pages rather than paragraphs.

We congratulate Mr. Turner with enthusiasm upon a great and outstanding achievement. But from him we could look for nothing else.

P. Malcolm Wright.

International Law. By L. Oppenheim. Volume 2: Disputes, War and Neutrality. Seventh edition. Edited by H. Lauterpacht. [London: Longmans, Green & Co. 1952. liii and 883 and (index) 56 pp. 80s. net.]

In his preface to the sixth edition, published in June, 1940, the editor stressed the certainty of approaching great changes in the law of war in the wake of the struggle which was then raging. In the interval it has become possible to take stock once again. As a result, it has become necessary to rewrite great parts of this work, for the creation of the United Nations Organisation, the revision of the Geneva Conventions in 1949, the conclusion of the War Crimes

trials and the shift in the law of neutrality have fundamentally affected the branches of the law described in this work. Professor Lauterpacht has shouldered the task of revision with determination. In addition to overhauling the bibliographical notes more drastically than in earlier editions, he has incorporated a vast amount of factual material in the text and in the footnotes. Moreover, entire chapters or sections have been added. In keeping with the character of this work Professor Lauterpacht has exercised much restraint in putting forward views of his own. One notes, however, his preference for the majority principle in the Security Council, his approval of liquidations of enemy property, the qualified rejection of war treason and his criticisms of the proposal to set up an International Criminal Court.

In a work of a comprehensive character such as this, which aims at surveying international problems on a truly international scale, absolute perfection is a goal which can never be reached. Thus the observations on the validity of the acts of a belligerent occupant are a little cursory (p. 219); *Murray* v. *Parkes* [1942] 2 K.B. 123, is obsolete as a result of the passing of the British Nationality Act, 1948 (p. 239, n. 2). The *Sovfracht Case* (p. 276) is not a reaffirmation of the *Daimler Case*. The summary of *Hugh Stevenson & Sons* v. *A. G. für Cartonnagen Industrie* [1918] A.C. 239 (p. 323, n. 3) is misleading unless read in conjunction with the summary of the same case given on p. 322, n. 3. The bibliographies might have included, on p. 35, n. 7: Kaeckenbeeck, *The International Experiment of Upper Silesia* (1942), on p. 69, n. 1: Gutteridge in *B.Y.* 21 (1944) pp. 1–10; on p. 303: Scelle in *Clunet*, 77 (1950) pp. 26–84.

In the end, the lasting impression is one of admiration for the skill and learning with which a seemingly overwhelming mass of detail has been marshalled with accuracy and wisdom.

K. L.

A History of English Law: Vol. 13. By Sir William Holdsworth, o.m., k.c., d.c.l., hon.ll.d. Edited by A. L. Goodhart, k.b.e., q.c., d.c.l., ll.d., and H. G. Hanbury, d.c.l. [London: Methuen & Co., Ltd. 1952. xlviii and 699 and (indices) 102 pp. 70s. net.]

When Holdsworth died in 1944, he left unfinished Book V of his great *History of English Law*. This book was intended to cover the period from 1701 to 1875, the Centuries of Settlement and Reform. He had expressed the hope in 1937 that one more volume would complete Part I, Sources and General Development, which had already filled no less than three volumes, and that he would be able to deal in two further volumes with Part II, the Rules of Law.

That did not happen. The volume under review carries the Sources and General Development from 1793 to the Reform Act, 1832, and in the Preface the Editors inform us that most of Volume 14 will be devoted to the completion of Part I. The greater portion of Part II is missing. Volume 13 is assured of a welcome, which not even its exorbitant price can diminish, but Holdsworth's treatment of the Rules of Law from 1701 onwards would have been invaluable. A law student may perhaps be forgiven for regretting that Part II was sacrificed to Sources and General Development.

For this reason he may chafe a little at the very full treatment of the Political and Constitutional Background, for the history of the political parties and ministries is available elsewhere. He may grow impatient with the frequent quotations from such standard authors as Halévy and Leslie Stephen in connection with Jeremy Bentham, to whom Holdsworth accords fuller treatment than to any other person in the whole *History*, Coke not excepted. The impartial and exhaustive account of the great reformer does justice to that strange paradox of a man.

But thereafter this feeling of regret will leave such a reader, for Holdsworth turns to topics more exclusively legal. The Movement for Reform in the Law is dealt with first and an account given of the pioneers in this field, especially Romilly and Mackintosh, and of Brougham's great speech in 1828 (which is misdated in the Table of Contents). This is followed by a truly monumental analysis of the statute law of the period.

The remainder of the volume is devoted to the professional development of the law, and the style and presentation become very reminiscent of Volume 12. The reader is introduced in turn to the reporters, writers and judges of the period. As before, the reporters are separated into the sheep and the goats, those who attained judicial rank and those who did not. The account of the literature of the period contains the only two passages not written by Holdsworth himself: he clearly intended to deal with Tidd's *Practice* and Maddock's *Equity*, but did not live to do so It is hardly necessary to add that the editors have adequately repaired the omission.

The last 200 pages are devoted almost exclusively to a consideration of the judges of the period, more especially the Chief Justices and Chancellors. Of the former, Ellenborough and Tenterden receive excellent treatment, but Tindal perhaps deserves more than six pages even though he might more properly appear in the next volume. Hidden among the common law judges is to be found an admirable account of the Court of Exchequer on the eve of its remarkable revival. Three Chancellors are considered: Erskine adequately, Eldon at length, and Brougham throughout the book. In the case of the third, the versatility of "Wicked Shifts" made any other treatment impossible. The sketch of Eldon's character and career is good, but the estimation of his

achievements as Chancellor is brief compared with the treatment of Hardwicke in Volume 12. Holdsworth explained that he would have more to say in Part II—which increases the feeling of regret at its loss.

The volume ends with an account of the Civilians, which is very naturally devoted almost exclusively to Stowell. Thereafter one finds an index of all the books and periodicals mentioned in the text, an index of names, and a more elaborate and very useful index of references to the eight persons most frequently mentioned. These are in addition to a very full subject index. The fact that these indices fill more than 100 pages testifies to their completeness.

The merits and defects of the great *History* must be so well known to every reader of this journal that a review of this present volume need only give an account of its contents: no attempt at evaluation is necessary. Slips are inevitable in a work of this size and character, but this reader has noticed very few, most of them unimportant. The first reference to Abbott C.J. on p. 385 should clearly be to Holt C.J., and the misquotations from Halévy, *Philosophic Radicalism* (p. 30) and Davis, *Age of Grey and Peel* (p. 177) might be misleading, were they not obvious. But no one will be mystified by the "tenant for life of a strip settlement" (p. 295).

M. J. P.

The Action on the Case. By A. K. Kiralfy. [London: Sweet & Maxwell, Ltd. 1951. xxxi, 185 and (appendices) 58 and (index) 3 pp. £2 10s.]

Dr. Kiralfy has set out to trace the history of the action on the case from its beginning until 1700, when, in his opinion, the focus of attention was shifted from forms of action to principles of liability. His method has been to supplement the printed sources by making extensive use of plea rolls. The fruits of this gigantic labour are now presented in the three Parts of his book, dealing respectively with the Origins and Theory of the Action on the Case, Actions on the Case in Tort, and Contract.

The result is an important book, whose most effective review will be the future work in which it must play so large a part; and there can be as little doubt about the value of this part as there is about the proportion and nature of the work which remains to be done. What follows is intended as a collection of relevant comments, rather than a review in the ordinary sense.

The present writer's principal interest, and his principal disappointment, was in the first Part, where the author has not stated clearly his answer to what must surely be the crucial question about the origins of case, namely, how was it related to trespass?

In many passages, especially in the Introduction and the chapter on Deceit, he has indicated a view something like that to be outlined below; for example, "the action on the Case, a form of trespass, was in fact a 'special' form of trespass, as distinct from the three or four 'general' forms, like '*quare clausum fregit*'" (p. 94). But elsewhere are hints of a totally different conception; for example: "Why was the term 'on the case' applied to trespass only? Why were all actions on the case species of the genus 'trespass'? Perhaps problems of jurisdiction were obviated by describing otherwise unrelated actions as actions of 'trespass' so as to obtain the benefit of a jury trial which accompanied actions for 'breach of the peace'" (p. 54); "The choice of Trespass as the mother-element was no doubt conscious. Trespass was effective. It lay in all the courts. It offered trial by jury"; and "the revolutionary change involved in treating Case as a form of Trespass" (both p. 44). Trespass, in short, is represented as the adopted mother of case, as it was represented by Mr. Fifoot as the "stock selected for grafting." In another passage (p. 32) Dr. Kiralfy speaks of "the pre-eminence of Trespass on the Case, and the withering away of any special categories which we can see in embryonic form, such as *Quare Impedit* on the case . . . , Waste on the case . . . , and Dower on the case. . . ." The reviewer would like to propose for inclusion in this list, as a specimen of debt on the case, the writ of *detinue de rationabili parte bonorum*; but he does not believe in any of them as being really the same sort of thing as case proper; nor does he believe in any representation of the relationship between trespass and trespass on the case which can envisage an analogous relationship between dower and dower on the case.

Any such representation postulates the existence in the thirteenth and fourteenth centuries of a definite wrong called trespass, and identifies it with the miscellaneous assortment remedied by the writs in the Register called writs of trespass. There seems to be no contemporary evidence for this; and, thinking away the usage of later times, it is not very likely. Surely it is more probable that lawyers, like laymen, used the word just to mean wrong. Perhaps the common lawyer had particularly in mind wrongs for which damages could be got in a royal court; perhaps he was thinking of the ambit of *quare* actions; but there is no reason to suppose that he meant anything more technical than that. When, as Professor Plucknett has described (*Concise History*, pp. 352–3), forms became stereotyped for the kinds of wrong with which the court most often concerned itself, obvious wrongs, they naturally continued to bear the generic name of trespass; hence the writs of trespass in the Register. But they were not yet *the* writs of trespass, and in the fourteenth century were distinguished, when necessary, by the name of common trespass. Trespass without

a difference still meant all kinds of wrong for which damages could be got, for instance the wrong done to the owner of a franchise of market by one who improperly trades outside the market (Y.B. 2 & 3 Edw. 2, Selden Soc., 71). In such a case as this, special matter would have to be recited in the writ to show why the act complained of was a wrong to this plaintiff; it was not an obvious wrong. But there is no reason to think that it was regarded as different in its nature from common trespass, or that there was as yet any harm in using a special writ where a common writ would have served (Y.B. 13 & 14 Edw. 3, Rolls Series, 134 at 136, *per* Shareshull). Trespass meant wrong, and when the name trespass on the case came to be used instead of special trespass it meant no more than an action on the case for a wrong. Dr. Kiralfy's question "Why was Trespass the vehicle of all actions on the Case?" (p. 3) disappears on this hypothesis; and so do some other problems, including that of the part played by the *In Consimili Casu* clause, which are created only by carrying the modern sense of trespass too far back in time.

Space has been devoted to this matter because it seems important that the older idea of the meaning of trespass, to which Dr. Kiralfy gives some countenance, should now be laid to rest; attention can then be turned to some real problems which will remain. When did trespass begin to acquire its modern narrow meaning? When did trespass and case become clearly different things? The first question may perhaps be answered by suggesting that the word trespass was gradually appropriated to what had formerly been distinguished as common trespass, when what had formerly been distinguished as special trespass acquired the new name of case. The new name, in its turn, was no doubt due to a realisation that the thing named had become something essentially different from what it had been, that writs reciting special matter had become something different from the old special trespass. What was this difference? What had happened? The answer must lie in the very important development thought by Dr. Kiralfy (p. 11) to have taken place about 1400, namely, the use of actions on the case to create new wrongs, and generate new rights, instead of merely protecting rights which demonstrably had an independent existence. The difference lay in the *cum* clause. In the old special trespass, this had recited some undoubted legal right, such as a franchise of market, whose existence could be vindicated by some other legal process, but whose day-to-day protection against particular infractions was achieved by the action for a wrong; there was no important difference between trading outside a man's market and tearing down his toll-booth. What then happened was that all sorts of alleged rights, which had no independent existence in the common law, began to be recited in the *cum* clause. This

was the spectacular event in the story of case, and it deserves investigation as such; its immediate relevance is that it was probably the event which earned case its name as something evidently different from the old trespass. The principle of the exclusiveness of forms then came into play, making it necessary to distinguish trespass from case, and challenging generations of lawyers to say what the distinction was. Dr. Kiralfy's premises lead him to say that the presence or absence of allegations of force and arms and breach of the peace was the criterion (p. 5). But this was not a distinction fundamental in the nature of the thing; what are we to say of one who *vi et armis et contra pacem* kept customers away from the plaintiff's market? (p. 5). Dr. Kiralfy has not explored the further problem of differences in process, but one might expect that these would, at any rate for a time, coincide with allegations of breach of the peace rather than with any distinction between trespass and case.

Turning to the second and third Parts of the book, the present writer's feelings are a mixture of admiration, gratitude, and regret. To dispose first of the regret, it is that Dr. Kiralfy did not aim at a more limited objective. The particular achievements of the action on the case are of course of the very greatest interest and importance, but there may be some doubt whether it is either possible or proper to make a detailed study of all of them at once. It may not be possible because of the enormous bulk of the material. And it may not be proper because such a treatment presupposes a central theme which is perhaps not really there. Dr. Kiralfy's purpose was " to deal with the entire subject in outline " (p. iv); but the outline of events was largely determined, not by the characteristics of case, but by the limits of other remedies. It is not the nature of plaster that determines the shape of the cast; and while Dr. Kiralfy has not considered case at all in isolation, and has expressly remarked the dangers of so doing (*e.g.*, at p. 16), it may be that his approach has led to a certain inconsequence in his accounts of particular exploits of the action. These are not claimed to be definitive; but it may be that their ultimate value will be as aggregations of important facts rather than as narratives.

There remain to be expressed this writer's admiration and gratitude for Dr. Kiralfy's work. It has been a vast and heroic labour, and the book contains a great store of most valuable information. Every future worker must use it and will find in it much important news and much to stimulate him. The work unquestionably remains to be done; but Dr. Kiralfy has quarried a great deal of the necessary material and made explorations which will show where more may usefully be sought.

S. F. C. Milsom.

Justice According to Law. By Roscoe Pound. [Yale University Press, New Haven; London: Geoffrey Cumberlege, Oxford University Press. 98 pp. 16s. net.]

It is perhaps natural for a lawyer to have a high opinion of his calling. But when he writes in praise of law it is important to know whether what he is praising is a system of rules with which he is familiar or an ideal system he would like to bring about. In these lectures on Justice, Law, and Judicial Justice, delivered at Westminster College, Dean Pound writes that law "presupposes a life measured by reason, a legal order measured by reason, and a judicial process carried on by applying a reasoned technique to experience developed by reason and reason tested by experience" (p. 91). "What the law has been trying to do is to adjust relations and order conduct so as to give the most effect to the whole scheme of expectations of men in civilised society with a minimum of frictions and waste" (p. 29). "Law is . . . what makes laws living instruments of justice. It is what enables courts to administer justice by means of laws; to restrict them by reason when the law-maker exceeds his reason, and to develop them to the full scope of the reason where the law-maker falls short of it" (p. 60). If this is indeed a correct description of the American system it is little wonder that Dean Pound finds it necessary, in the words of the dust cover, to sum up his belief in the justice of the courts as against the substitute agencies.

Dean Pound would almost certainly reply that he is really praising neither a particular concrete system nor a particular abstract ideal, but a particular system which includes as one of its sources a particular ideal—and which has had a considerable measure of success in achieving it. But if this is what he means it is not what he says, and a good case is not improved by lack of precision or overstatement. One may heartily agree, however, when he says that "Our administrative tribunals have no such taught tradition of experience developed by reason behind them as have our courts or the administrative agencies of Continental Europe. To develop and systematise such a taught tradition and fit it to our political and legal tradition of the supremacy of the law is the task of American jurists" (p. 83). This is the true and truly great Pound, pointing the way to the job that needs to be done, and supplying the inspiration, while ranging, as only he can range, over the whole field of the philosophy of law and justice. In such a leader one can forgive traces of that Blackstonian complacency which in some of his contemporaries can be truly alarming. The world is in no mood for what Pound calls "positive natural law," or the identification of justice within the existing legal system and vice versa.

B. E. K.

Soviet Legal Philosophy. Twentieth Century Legal Philosophy Series: Vol. 5. By V. I. Lenin, P. I. Stuchka, M. A. Reisner, E. B. Pashukanis, J. V. Stalin, A. Y. Vyshinsky, P. Yudin, S. A. Golunskii, M. S. Strogovich, I. P. Trainin. Translated by Hugh W. Babb, with an introduction by John N. Hazard. [Cambridge–Massachusetts: Harvard University Press. 1951. xxxvii and 465 pp. $7.50.]

A critical appreciation of the contents of this volume would carry the reviewer far beyond the bounds of his allotted space, so that a few notes is all that can be attempted. It is suggested that the admirable introduction of Professor Hazard should be studied carefully and his biographical sketches of the authors quoted individually be re-read before embarking on the relevant writings. For their works are comprehensible only in the light of their contemporary circumstances. For their reason too it is best to begin with the extracts from the work of Golunskii (now Soviet Judge of the Permanent Court of International Justice) and Strogovich, *The Theory of the State and Law.* This, written in 1940, looks backwards over the history of the revolution and can display the inevitability of what had happened. It can quote Stalin for most of its propositions. This is child's play compared with the tasks facing the earliest writers. Its assurance should be compared with the wrestlings of Pashukanis with the Hegelian dialectic in 1924, trying to wring from it the inevitable course of future legal developments—and this with his vain effort to save himself, in 1930, from the consequences of failure by concluding that "revolutionary legality is a problem which is 99 per cent. political." But Stalin decided that law was *not* to wither away in the Socialist State so long as it had internal and external enemies. By 1938 Vyshinsky is calling Pashukanis not only a traitor but a thief (p. 331). Professor Hazard tells us that Pashukanis disappeared in 1937 and has not been heard of (save by abusive reference) since.

The lesson most forcibly taught by this volume is that legal philosophy (whether or not it is recognised as such) is of the highest political significance. In a time of revolutionary change its pursuit can be highly dangerous to those of its practitioners who find themselves on the wrong side of the fence. They are a real menace to authority. But the Russian experiment is settling down and Soviet legal philosophy now knows what it has to explain and justify. Its tool is a neo-Austinianism which differs from the "bourgeois" version mainly in its insistence that the task of law is the creation of a Socialist State. For those who still believe that law is adequately defined as the will of the State the writings of Golunskii will present no difficulties. His historical sketch of the development of legal theory is about as good as can be accomplished in its brief

compass. If the influence of class interest on legal theories is somewhat exaggerated this is at least a stimulating contrast to some current American complacency. But surely it must be with his tongue in his cheek that Golunskii avers that "the worker class found in its hands a mighty weapon in the decree (of June 26, 1940) concerning the transition to an eight-hour workday and a seven-day work-week, and forbidding workers to quit work. . . ." (p. 390)? There may well be worker classes which could scarcely be blamed for wishing to renounce so powerful a boomerang.

B. E. K.

Bailment in the Common Law. By G. W. Paton, M.A., B.C.L., of Gray's Inn, Barrister-at-Law; Vice-Chancellor of the University of Melbourne. [London: Stevens & Sons, Ltd. 1952. xl and 446 and (index) 8 pp. £3 15s. net.]

Though bailment straddles the law of contract, tort and personal property it is a subject that is *sui generis* and it is a boon to have a scholarly modern survey. This is a source book explaining and analysing the principles of English, Commonwealth and American decisions and the relevant English statutes. Part I, pp. 1–92, deals with the definition and history of bailment, analysing its proprietary, contractual and tortious aspects, the confusion caused by the term "special property," the impact of Roman Law, the peculiar influence of the forms of action, the standard of care—*Southcote's Case* and *Coggs* v. *Bernard*, and the practical development of modern times. The problem of "double possession" is ably discussed at pp. 6–9 in the light of the Court of Appeal decision in *Dollfus Mieg et Cie S.A.* v. *Bank of England* (French gold bars looted by Germans, brought back after the War and deposited by the United States, French and United Kingdom Governments with the Bank of England). The preface deals with the House of Lords decision, under the name of *U.S. of America and Republic of France* v. *Dollfus Mieg et Cie and Bank of England* [1952] 1 T.L.R. 541, and readers will share the author's regret at the inability of English law to solve the problem. Part II, pp. 93–164, has chapters on gratuitous bailment (a topic complicated by the capricious element in consideration), deposit, involuntary bailees, finding, mandate, gratuitous carriage, gratuitous loan for use and intermixture of chattels. A note at p. 98 sounds the hostility of the common law to the term "gross negligence," and at p. 110 the view is expressed that the criterion of reasonable care will win the day. Part III, pp. 165–378, is concerned with the onus of proof (bailment is rightly regarded as distinct from the conflicting views produced by *res ipsa loquitur*, pp. 166–170), custody, innkeepers, carriers, hire, hire-purchase, hire of work and labour and pledge. On the

question of the bailee's liability for the acts of a servant, there is a lucid analysis of *Aitchison* v. *Page Motors, Ltd*, *Coupé Co.* v. *Maddick* and *Sanderson* v. *Collins* at pp. 183–4, and it is suggested that in *Cheshire* v. *Bailey* (theft by servant) the plaintiff himself was in possession of the goods, and therefore it was not a case on bailment, p. 184. A very clear exposition is given of who is a common carrier, pp. 226–233, the effect of conditions limiting liability, pp. 265–273, and the relationships between the taxi-cab owner and driver at pp. 287–288. Part IV, pp. 379–430, is devoted to remedies, and the difficult problem of the measure of damages in claims for breach of bailment is ably discussed at pp. 405–418. Part V, pp. 431–446, deals with the subtle problems arising from the impact of criminal law on bailment. The book is noteworthy for its arrangement and clarity, for the numerous practical points raised and for the well-reasoned solutions suggested to problems not covered by authority. This is indeed a learned contribution to the law of bailment useful to the practising lawyer and to the teacher of law.

T. E. L.

Classical Roman Law. By Fritz Schulz. [Oxford: Clarendon Press. 1951. xii and 633 and (index) 9 (addenda) 6 pp. 42s. net.]

This is a much-needed contribution to English literature on Roman law, where the traditional treatment has been to present a bird's-eye picture of the law from start to finish, indicating the various stages of growth like contours on a map. Here, by contrast, we have a cross-section of the growing law at the time of the classical period. A review limited to a few words can only express a general impression in terms of approval or disapproval, and on the whole the impression is one of approval. Those acquainted with Dr. Schulz's work need no introduction to this book. The style is vigorous, and the subject-matter handled with assurance. There is plenty to excite controversy. Dealing as it does with classical law, the author has either to accept doctrines as classical or reject them as interpolations, and so throughout the whole book the interpolation issue keeps casting attractive baits.

At the end of each section is a citation of sources and bibliography, referring to works other than standard textbooks. (A list of the latter is given on p. 9.) The bibliography is clearly intended for advanced students; but even apart from this, one doubts whether the book is really fitted for beginners. On this point we venture respectfully to dissent from the learned reviewer in the *Law Quarterly Review*. The book begins with the Law of Actions, and the first chapter on "Fundamental Notions" is no food for babies. Indeed, the author himself advises (p. 7) that the Law of

Actions be read twice. Over and over, among the citations of sources the word " interpolated " appears in brackets after a text. Most of these are subject to dispute, and to let a student imagine that they are accepted as interpolated would seem unfair, to expect him to judge for himself impossible. Then again, a false impression is created by the dogmatic exclusion of doctrines as unclassical. To take a random example, classical lawyers, it is said (p. 436), " knew no such thing as *constitutum possessorium*." Contrary opinion on this point is relegated to the bibliography, but since, as the author admits, students are unlikely to follow this up, the impression created is one-sided. We would conclude that this is not a student's book. For the research worker or the teacher, on the other hand, it is altogether stimulating and deserving of the closest study.

R. W. M. D.

The Elements of Roman Law with a Translation of the Institutes of Justinian. By R. W. Lee, D.C.L., F.B.A., Reader in Roman Law of the Inns of Court. Third edition. [London: Sweet & Maxwell, Ltd. 1952. xxiv and 477 and (index) 11 pp. 30s. net.]

Lee's *Roman Law* has now become one of the most familiar elementary works on the subject to the student. This new edition does not contain any major alterations. The principal changes in the text appear to be these: on p. 61, section 83 on the forbidden degrees of marriage has been recast; on p. 64, the author has committed himself to the view that *manus* was recognised by the time of the XII Tables; on p. 103, para. (vii) on adoption in modern law has been recast; and on p. 474, a new Appendix II on the *Actio Publiciana in rem* has been added. In addition to these there are at least 22 other changes, occasionally in phraseology, but chiefly additions to or substitutions of footnotes.

Three minor points, not as to the law, are worth raising. On p. 324, would it not be appropriate to include a reference to Professor de Zulueta's article in the *Journal of Roman Studies*, (1935), Vol. XXV, Pt. I, p. 19, on the new fragments of Gaius, as this is probably the best discussion accessible to English students? The next point, perhaps trivial, is a certain lack of consistency in the naming of the parts of the formula: (pp. 432–3). Thus, " *intentio* " is translated as " intention," but is called " *intentio* " in section 705 and " intention " again in section 708. The terms " *adjudicatio* " and " *condemnatio* " are preserved, while " *demonstratio* " is called " demonstration " in the translation and in section 705, but " *demonstratio* " in sections 713 and 714. Finally,

attention is drawn to the fact that the addition on p. 423 of a new note 21a necessitates an alteration in the numbering of the next note on the following page.

The third edition is not usually the occasion for raising questions either as to the approach adopted or controversial topics. Whether the inclusion of the translation of the Institutes is desirable or not is a matter of opinion, and it would be interesting to know if it has succeeded in fulfilling the hope expressed by the author in his Preface. A respectful doubt might also be registered as to the suggestion on p. 372, n. 5, that *furtum manifestum* means "theft carried in the hand," on the hypothesis that "*–festus*" is "the missing past participle of *fero*." For a different suggestion, see Rabel in Z.S.S. lii (1932) at pp. 473 *et seq.*, where he reviews the whole question. Lastly, a point which has recently been brought to the notice of the present reviewer is worth mentioning. There seems to be an ambiguity in the statement on p. 393, s. 618, that "If anything was thrown, or poured, from an upper room, causing bodily injury to a free person passing or standing below, the occupier was liable for double the damage calculated on general principles . . . , to the exclusion of damage to the man's property, *e.g.*, to his clothes." If this means that damage to property is excluded altogether, it does not appear to be justified by 9.3.1 pr and 9.3.1.6. The point at least merits reconsideration.

R. W. M. Dias.

The Great Red Book of Bristol. Text (Part III). Edited by E. W. W. Veale, ll.d. (Lond.), Solicitor, and formerly Reader in Legal History at Bristol University. [Bristol Record Society. 1951. 183 and (index) 13 pp. 27s. 6d. net.]

Legal historians will find this fourth volume of Dr. Veale's work on the *Great Red Book of Bristol* doubly attractive. It contains an account of the several courts of Bristol and of their jurisdiction as well as a further one hundred folios of the text. With one more volume the text will be complete.

The Great Red Book was not arranged chronologically or according to subject-matter. It so happens that all the contents of the present Part (unlike those of Part II) of the text are of immediate interest to the legal historian, who will find here wills, ordinances, licences, charters of feoffment, leases and assignments thereof, and an indenture of mortgage, all from the second half of the fifteenth and first half of the sixteenth centuries.

It is now almost 20 years since the reader of Part I of the text was promised an account of the courts of Bristol. For reasons given in the Preface, this has been published in this volume and not

separately as a sequel to Part I of the Introduction. The author's work upon manuscripts at the Public Record Office and elsewhere has been extensive: it could not hope to be exhaustive. His conclusions are "tentative" only: further research must now be left to others.

Dr. Veale has done much to illuminate the history of the courts of Bristol, as, for example, in giving us instances from the Early Chancery Proceedings of interference by the Chancellor in the activities of the Staple Court. The present reviewer hopes that he will not appear unappreciative if he confesses that he found certain points mystifying, such as the suggestion on p. 12 that the Assize of Nuisance was "peculiar to boroughs." It is indeed "a thousand pities that no indication at all is ever given of the cause of action" in the books of the Court of the Mayor and the Sheriff (p. 53), but is it safe to assume that an entry of "Trespass on the case" excludes the possibility of *Indebitatus Assumpsit*? At common law, no other entry would be as appropriate. The resulting conclusion as to the relation between this court and the Tolzey Court must be suspect. Such points, however, do not prevent this book from being a very welcome addition to the Bristol Record Society's Publications as Volume XVI.

M. J. P.

Feudalism. By F. L. Ganshof, Professor of Medieval History in the University of Ghent. Translated by Philip Grierson. [London: Longmans, Green & Co., Ltd. 1952. xix and 160 pp. 16s. net.]

Along the boundary separating the fields of Law and History the historian has now erected warnings that "Trespassers will be prosecuted." The lawyer accepts this as conclusive evidence of the historian's ignorance of the law, past and present, and returns to his search for authorities.

As a result, although Professor Ganshof's "*Qu'est-ce que le féodalité*" has been appreciated by historians for eight years, it is doubtful whether this work will become known to lawyers even in its English edition. Yet it is a book which any lawyer would find wholly enjoyable. The author is a historian, but an historian with a legal training, who writes primarily of a legal concept, the relationship of lord and man.

Those who have read the French editions already know that they will not be overwhelmed by a mass of footnotes and that the facts given will always illustrate vividly the point made. Countess Richilda of Flanders will be an old friend. But this is more than a translation of the second French edition. Firstly, the author has made many additions and corrections. The references to the position in south-west France are very welcome. Secondly, he has

wisely allowed his translator a free hand. The result is an admirable translation, both accurate and readable, for which Mr. Grierson will have the gratitude not only of the author but of every reader. Is it not possible to see the hand of the translator in the well-known illustration from Madox on p. 82, and in the correcting reference to *Quia Emptores* on p. 132? The English lawyer will note that the reference to the marriage of male heirs in England on p. 129 would in the context be less misleading if restricted to male wards, and he may pause for a moment at the translation of *propriété* by "real property" (p. xv) and the rendering of *actes juridiques* as "separate types of acts" (p. 131). That he does not pause more often is a very real tribute to the translation.

But what will be the more general reactions of an English lawyer? He will probably find that his conception of feudalism is too broad. "To the lawyer feudalism means that the land of the country is not owned by the persons who to the outward eye appear to be owners, but is held by them of someone else" (Cheshire, *Modern Law of Real Property*, p. 9). Feudalism to him means tenure, and the distinction between vassal and serf is that between free and unfree tenure—so long, at least, as villein tenure implies villein status. Yet of the serf this book has nothing to say: in spite of servile homage, villeinage is manorial and agricultural rather than feudal and military.

Feudalism therefore means Free Tenure, and a fief is a free tenement? But this refinement, the lawyer now finds, is not so: frankalmoign is neither feudal nor a tenure but "a privileged form of ecclesiastical allod" (p. 116). He does meet tenure by serjeanty, which he knows to be both free and military, and this at any rate is feudal. Even so, in Germany at least, the serjeant is a *ministerialis*, who is in origin a serf.

His natural reaction is to ask of the great residuary free tenure lying between serjeanty and villeinage. But he searches in vain for the tenant in socage, who has if not a fief, at any rate a fee: the keystone of his Real Property is missing. Knight service alone is truly feudal. He is the better able to appreciate Sir Frank Stenton's reminder that "English feudalism is the product of English history" (Preface, p. viii) and Maitland's aphorism that "our *Lehnrecht* is *Landrecht*."

M. J. P.

Compensation for the Compulsory Acquisition of Land. By A. W. Nicholls, M.A., B.Litt. (Oxon.), of Gray's Inn, Barrister-at-Law. [Hadleigh, Essex: The Thames Bank Publishing Co., Ltd. 1952. xxvii and 447 pp. 65s. net.]

This book is concerned with the compensation payable on compulsory acquisition of land and with assessment of development

charge, and not with the whole range of compulsory acquisition; thus it does not deal with the power to acquire and the making of compulsory purchase orders. The legislation relating to compensation is an intricate maze; the ordinary process of amending legislation is bad enough, but in this field we have statutes which are still in force but are " modified " by later legislation. This volume gives us the text of the relevant statutes with an adequate machinery of annotation and reference. The success of a book of this kind depends on bringing together all the texts that one wants to consult and arranging the material so that it is convenient to use, and Mr. Nicholls has done this very well. Unfortunately for Mr. Nicholls, the Government White Paper *Proposals for the Amendment of the Town and Country Planning Act, 1947*, published in November, 1952 (Cmd. 8699), forecasts changes in major matters. The first instalment of new legislation should be passed early in 1953 and a further Bill be introduced in the autumn. Development charge goes, and a new basis for assessing compensation will come into force. A most useful work-book thus loses much of its appeal, but this is a hazard that must be run by those who write about subjects that are rapidly developing through trial and error.

R. M. J.

An Introduction to Evidence. By G. D. Nokes, ll.d., of the Middle Temple and South-Eastern Circuit, Barrister-at-Law; Reader in English Law in the University of London. [London: Sweet & Maxwell, Ltd. xxxii and 415 and (index) 12 pp. 35s. net.]

This is an admirable new book, a happy blend of the practical and theoretical, and of the historical and philosophical approach to the subject. The author's practical experience at the English Bar, as a judge in India and his academic qualifications as a Reader and examiner, have enabled him to give a new and original presentation of the subject and resulted in a scholarly, reliable and readable work. After a preliminary part on the nature and sources of evidence and special means of establishing facts, the order is: admissibility of facts, admissibility of hearsay, means of proof, and addition and assessment of evidence. The statement of the rules is clear and precise; the explanations and illustrations are illuminating and to the point, and recent authority is used to advantage down to the end of 1951. The chapters on presumptions, similar facts—the analysis of *R.* v. *Sims* and *Noor Mahomed* v. *R.*, pp. 87–90, character, estoppel and burden of proof are outstanding. It will establish itself as the student's textbook.

A. D.

The Sale of Land. By Edward F. George, ll.b., Solicitor of the Supreme Court; Attorney of the Supreme Court of South Africa and of Southern Rhodesia. [London: Sweet & Maxwell, Ltd. 1952. lxiii and 542 and (index) 34 pp. £3 3s. net.]

This book is designed for solicitors and conveyancing clerks and gives a clear and well-written explanation of all matters met with in the ordinary practice of purchase and sale, including registered land. The subject-matter is dealt with in the order in which the steps are taken in practice by the solicitors of the vendor and purchaser, the instructions, the varied preliminary inquiries before contract, the contract itself, conditions of sale, the abstract and its proof, searches, investigation and requisitions on title right through to the completion and remedies. Practical suggestions abound to guard the unwary, indicating various matters that have to be borne in mind even though not directly concerned with conveyancing. The text is illustrated with several forms, *e.g.*, statutory declarations of identity, notice making time of the essence, preliminary inquiries and requisitions. The Planning legislation is considered at length and the numerous inquiries it involves are carefully explained. The citation of relevant statutes and decisions seems accurate and up to date. The great merits of the book are its practical approach and its effective classifications of subject matter. It should prove of great assistance to young solicitors and conveyancing clerks.

C. L.

Constitutional Laws of the Commonwealth. By Sir Ivor Jennings, q.c., litt.d., ll.d., Vice-Chancellor of the University of Ceylon, and the late C. M. Young, m.a., ll.b., of the Middle Temple, Barrister-at-Law. Being a second edition of *Constitutional Laws of the British Empire.* [Oxford: at the Clarendon Press: 1952. xxiv and 383 and (appendix and index) 146 pp. 35s. net.]

Bagehot, when writing of the English Constitution, said that the great difficulty of a writer on that topic is that the object is in constant change. How much greater are the difficulties of a writer on the constitutions within the British Commonwealth; for here, not only does each object change, but so does the nomenclature. Thus there has had to be a change in title from *Constitutional Laws of the British Empire* to *Constitutional Laws of the Commonwealth*; the chapter on Dominion Status is now called Independent Status, and in the British Nationality Act, 1948, these self-same bodies are referred to as " countries." But it is from this very lack of precision

and stability in terminology that the author deduces the adaptability of the Commonwealth to meet changing conditions. "The task of definition is left to academic lawyers who, being independent, are ipso facto irresponsible."

The change in substantive law is, of course, as great as the change in name. This edition contains entirely new sections on Citizenship and Secession, new chapters on New Zealand, India and Pakistan, Ceylon and the Republic of Ireland, and much of the material of the other chapters has had to be recast and amended. Nevertheless, the book retains its original form of introductory chapters on particular topics followed by extracts from decisions referred to in the introductory material. It is at this point that one is sometimes left with the feeling that the space occupied by extracts from decisions is somewhat excessive when compared with that devoted to descriptive material, explanation and comment. In the case of Canada, for example, there are nine pages of introductory material (pp. 185–193) and 70 pages of cases (pp. 194–264); Australia has 13 pages of comment (pp. 265–277) and 65 pages of cases (pp. 277–342). The student would, we think, appreciate more guidance as to principle even at the cost of some of the more readily accessible cases being omitted from the text.

Though the author's Preface is dated July, 1952, the date-line of the material is, we think, about 1949. This probably accounts for the omission of any reference to the South African Citizenship Act of 1949, the British North America (No. 2) Act, 1949, the Privy Council Appeals Act, (S.A.), 1950, the Legislative Council Abolition Act, (N.Z.), 1950, or the British North America Act, 1951. The student's attention might, however, have been drawn (at p. 193) to *Att.-Gen. for Ontario* v. *Canada Temperance Federation* [1946] A.C. 193, and *Co-operative Committee on Japanese Canadians* v. *Att.-Gen. for Canada* [1947] A.C. 87, for they contain important statements relating to the "emergency" powers of the Dominion Parliament. Again, suggestions have been made in recent years whereby, by delegation, some of the difficulties arising from the distribution of legislative powers in the Dominion might be overcome. A reference to these suggestions, particularly in the light of the decision in *Att.-Gen. for Nova Scotia* v. *Att.-Gen. for Canada* [1951] S.C.R. 31, would be of value. The recent and all-important South African decisions concerning the "entrenched" sections of the South Africa Act were unfortunately reported too late for any reference to be made to them, but they seem to bear out what we conceive to be the doubts of the author (at p. 345) of what had been deduced from *Ndlwana* v. *Hofmeyr*.

The valuable Appendix of constitutional documents has been expanded as well, and now contains additional material relating to New Zealand, India and Ceylon, and the British Nationality Act, 1948. As the author says, a book of this size cannot provide

a comprehensive study of the constitutional law of any one member of the Commonwealth. Nevertheless, this edition will maintain it in its place as the acknowledged student's textbook on the subject.

T. C. T.

Modern Equity. The Principles of Equity. Sixth edition by Harold Greville Hanbury, d.c.l., Vinerian Professor of English Law in the University of Oxford; Fellow of All Souls College, Oxford; Honorary Master of the Bench, Inner Temple. [London: Stevens & Sons, Ltd. 1952. xl and 716 and (index) 58 pp. £3 3s.]

Introduction to Equity. Third edition. By G. W. Keeton, m.a., ll.d., Professor of English Law in the University of London; Dean of the Faculty of Law, University College, London; of Gray's Inn, Barrister-at-Law. [London: Sir Isaac Pitman & Sons, Ltd. 1952. xxxvii and 358 and (index) 18 pp. 45s. net.]

Six editions in seventeen years are sufficient evidence of the merits of Professor Hanbury's valuable and stimulating work. A reviewer need only note that a careful and thorough revision has been made incorporating new statutes, case law and legal literature. Influenced by Denning L.J. (judicially), by Evershed M.R. (not *ex cathedra*) and by Roxburgh J. (in a review of his previous edition 65 L.Q.R. 524–7), the author has changed his view as to the effect of the Judicature Act, 1873—on adjective law the effect was immediate, on substantive law, "fusion may ultimately arrive, but we still have some way to travel." This topic and charitable trusts have undergone a major operation, and minor ones have been performed on the effect of mistake, misrepresentation and fraud, consideration and equitable estoppel, rectification, licences and relief against forfeiture in leases. The section on priority notice has now been rectified, pp. 444–5; there is an eminently just evaluation of *Chandler* v. *Crane, Christmas*, pp. 704–5 and a careful analysis of Denning L.J.'s views in *Smith and Snipes Hall Farm, Ltd.* v. *River Douglas Catchment Board*, pp. 150–1. The following additions are suggested at p. 54, *Mitas* v. *Hyams* (1951) 2 T.L.R. 1215 (C.A.) (variation of a lease), p. 158; *Re Freeland* [1952] Ch. 110 (rule in *Strong* v. *Bird*). Reference could have been made to the authorised reports at pp. 96 (15), 134 (56), 658 (22), and at p. 659, line 17 the *De* is unwarranted.

Professor Keeton claims three editions in twelve years. Each topic is dealt with historically and there has been considerable enlargement with new chapters on Married Women, Infants, Persons of Unsound Mind, Powers of Appointment, Fraud, and another four

on Equitable Remedies. His original view that the changes made by the Judicature Act were fundamental is now well justified. Many topics are dealt with at an advanced level, *e.g.*, Assignment. *Re Haves* [1951] 2 All E.R. 928 (satisfaction), *Butler* v. *Mountview Estates* [1951] 2 K.B. 563 (rectification) might have been referred to. At pp. 315–6 it should be noted that unregistered restrictive covenants are *not* void against a purchaser for value, but only against a purchaser of the *legal* estate for money or money's worth; L.C.A., s. 12 (2) should be 13 (2), and that since the Lands Tribunals Act, 1949, application for discharge is made to the Lands Tribunal and not to an arbitrator.

T. E. L.

Private International Law. Fourth edition. By G. C. Cheshire, D.C.L., F.B.A. [Oxford: At the Clarendon Press. 1952. l and 664 and (index) 24 pp. 50s. net.]

The Conflict of Laws. Second edition. By R. H. Graveson, LL.D., S.J.D. [London: Sweet & Maxwell, Ltd. 1952. xxxii and 446 and (index) 9 pp. 35s. net.]

The thoroughness with which Professor Cheshire has revised his book appears in that he now describes as " scarcely rational or helpful " the arguments against " the much maligned decision " in *Roberts* v. *Brennan* although this decision was condemned and these arguments were presented in the last edition with considerable vigour and eloquence. Choice of law in nullity is now discussed without distinguishing void and voidable marriages. Consequently there is no occasion to explain that a marriage voidable for reasons unknown to English law is not likely to be dissolved by an English court. It is surprising to find hardly any criticism of *Maher* v. *Maher*, and regrettable to find none of *Armitage* v. *Att.-Gen.* If Professor Cheshire could be persuaded to approach this case more critically, as he has shown himself inclined to do in 61 L.Q.R. 361, he might be led on to reconsider it in relation to *renvoi*. The effect of his array of arguments against *renvoi* is destroyed by the far-reaching exceptions which are admitted. An account of Westlake's *désistement* theory would improve the explanation of *renvoi* as it would demonstrate that Mr. Dobrin's argument, which Professor Cheshire adopts, is the same in substance as that based upon *Casdagli* v. *Casdagli*. The point is of importance beyond *renvoi*. The conflict of laws can only function between legal systems which accept their co-existence as equals and which contemplate international exchange and interavailability of the rules of internal laws. This is denied not only where capitulations are in force or where laws are separated by iron curtains, but also by *ad hoc* conflict rules

as those for which, quite gratuitiously, search was made in *Pugh* v. *Pugh*. Professor Cheshire does not seem aware of this. He seems prepared to accept *Pugh* v. *Pugh* without protest and indeed adopts the same fallacious method when, on page 295, he argues against the dual domicile doctrine in relation to capacity to marry. Professor Cheshire's fight in the earlier edition of his book for the law of the matrimonial domicile had all the appearance of championing a lost cause. He is, therefore, entitled to take full advantage of the favourable comments made on his theory by Lord Greene in *De Reneville* v. *De Reneville* and by Lord Justice Denning in *Kenward* v. *Kenward*, although these comments were in the nature of *obiter dicta*. But it is astonishing to find that he also claims support from *Risk* v. *Risk*. Barnard J. there refused to grant a decree of nullity (not divorce, as stated on page 306) not because he considered the marriage to be valid, but because it was polygamous and therefore excluded from matrimonial relief in an English court. According to Professor Cheshire's view this was a valid polygamous marriage, and Barnard J., if he agreed, could have relied on the observations of Denning L.J. in *Kenward* v. *Kenward* which were directly in point. Yet he did not say that, nor did he say that he was prevented by the lack of jurisdiction over polygamous marriages from saying it. On the contrary, he stated that he was prevented by this lack of jurisdiction from declaring that the marriage was void. This case also does not support the view that the law of the matrimonial domicile decides whether the marriage is polygamous. The rival claims of this law and of the *lex loci celebrationis* were not considered by Barnard J. as there was no occasion to do so. The petitioner's understanding of the nature of the ceremony was stressed to show that she was estopped from disputing the polygamous nature of the marriage, not—as Professor Cheshire maintains—its validity. The decision to refuse a decree of nullity was right in view of the now established distinction between recognition and enforcement of polygamous marriages. But the opinion of Barnard J. that the marriage was void was wrong, not because it conflicted with Professor Cheshire's theory that capacity is governed by the law of the matrimonial domicile, but because no question of capacity was involved. The confusion is due to the unfortunate habit of describing the ability to marry polygamously as a matter of personal capacity rather than as a quality of a system of law. This can be traced back to Fitzpatrick's comments on *Re Bethell* of which Professor Cheshire approves. He also says on page 306 that *Risk* v. *Risk* presumably involved a question of capacity and on page 311 he uses the expression " capacity for intermarriage." This fallacy finds its most concrete expression in his use of the terms polygamist and monogamist, which he employs in the course of a purely circular argument against *Chetti* v. *Chetti*. On the other hand, Professor Cheshire has now abandoned the suggestion made previously to

legalise polygamous marriages in England. This is a welcome change of mind as this suggestion would have introduced some form of capitulation in Europe just when these anachronistic obstacles to the normal functioning of the conflict of laws had been abolished in the East. In this context it is relevant that Jewish marriages are no exception to the monogamous nature of all marriages celebrated in England. This is not merely a matter of custom, as stated on page 285, but of Jewish law ever since polygamy was forbidden to Jews living in monogamous countries by the decrees of Rabbi Gerson of Mainz (960–1030).

Of the remaining alterations in this edition, particularly extensive in relation to domicile and to contract, there is no space to say more than that they have brought the book thoroughly up to date, and that they have left unimpaired those qualities of Professor Cheshire's work which have secured for it a leading place in our literature on this subject. Beginners may still feel at times bewildered, or even irritated, by Professor Cheshire's characteristic mixture of explanation and argument. On the other hand this may well be the principal attraction which the book has shown itself to possess for the judges.

Although Professor Graveson's book has grown by about 60 pages, it still can claim the merit of brevity which will enable beginners to cover the whole ground in the short time they may be able to devote to this subject. The new developments have been incorporated accurately and skilfully. But the new chapter on the limits of application of foreign law might be improved if the distinction between public policy as a concept of internal law and of the conflict of laws were explained as well as that between statutory choice of law rules and statutes of extraterritorial operation. Professor Graveson seems to think that the Age of Marriage Act should be applied in an English court even to persons not domiciled in this country. He has kept down to a minimum critical comment even on those subjects on which he has made known his views elsewhere. His discussion of capacity to acquire a domicile is much shorter than that in Professor Cheshire's book and this self-denial deserves special commendation in view of the inevitable tendency of this theory to increase—perhaps unnecessarily—the difficulties and uncertainties of establishing domicile.

J. Unger.

Pollock's Law of Torts. Fifteenth edition. By P. A. Landon, M.A., M.C., Honorary Bencher of the Inner Temple; Fellow and Tutor, Trinity College, Oxford; Reader in Criminal Law, Oxford University; formerly Lecturer to the Law Society. [London: Stevens & Sons, Ltd. 1951. xiii and 446 and (index) 34 pp. 63s. net.]

In this fifteenth edition of a leading text the revising editor has continued his prior plan and has "left the text and Pollock's footnotes exactly as they stood in the last edition which he himself produced in 1929, save where the treatment is obviously out of date, when the new matter is indicated . . . by square brackets" (p. v).

Within these limits, and with the aid of several excursuses, Mr. Landon refers to recent important changes in the law, wrought by both decisions and statutes. When he disapproves strongly of a recent decision he says so: "The judgments in the Court of Appeal were, it seems, unconsidered, . . . But the Court of Appeal has spoken, and all that one can do is to wring one's hands . . ." (p. 128).

In a field of law as dynamic as tort law it is difficult to write a satisfactory new edition within the limits of glosses on an unchanged text. This is particularly evident in chapter 11 on Negligence, and chapter 12 on Duties of Insuring Safety. Mr. Landon points out that these chapters "remained in form, and to a large extent in substance, identical in all the editions from the first to the thirteenth" (p. 326). Any analysis of negligence from the viewpoint of 1886, when the modern law was in its infancy, cannot be adequate 65 years later. Mr. Landon warns the reader that "a considerable amount of rewriting would be necessary to bring the treatment into line with the ordinary presentation in up-to-date textbooks" (p. 326). He might have said more directly that these chapters are inadequate, incomplete and, in part, misleading. Even the magic of Pollock's name does not justify leaving the text unchanged in a book intended to be a working tool. His words can always be found in earlier editions. The rules concerning negligence and legal cause, and their ramifications, including the duties of possessors of land and of manufacturers and vendors of chattels, are too important a part of tort law to be dealt with in such fashion.

Space limits narrow comment to one other point. The references to American law should have been revised or eliminated, particularly the citations to unidentified, but apparently out-of-date, editions of American textbooks and case books. American tort law has changed substantially in this century. The United States Supreme Court's decision in *United Zinc and Chemical Co. v. Britt* (1921) 258 U.S. 268, for example, is not followed today in many states and has been disapproved by The American Law Institute. Yet that decision, which is not binding authority on any state court, is cited (p. 406) as stating the recent American law. The examples could be multiplied.

Mr. Landon's own contributions to this, and the previous, editions are so excellent that one wishes he had not set himself such rigid limits within which to work.

Laurence H. Eldredge.

Gibson's Conveyancing. Seventeenth edition. By R. H. Kersley, M.A., LL.M., Solicitor. [London: The Law Notes Lending Library, Ltd. 1952. cxii and 719 and (index) 65 pp £3 17s. 6d. net.]

The Elements of Conveyancing. (With Precedents.) Eighth edition. By John F. R. Burnett, of Gray's Inn, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1952. xxxi and 490 and (index) 18 pp. £2 7s. 6d. net.]

These two leading textbooks have been written by practising lawyers with a long experience of teaching the subject to students. *Gibson* has the more practical approach necessary for the articled clerk in the Final, and the first resort of a solicitor before turning to larger works. *Burnett* is less detailed, suitable for Bar students and contains a useful collection of simple conveyancing precedents, miscellaneous documents, and forms relating to registered land with explanatory footnotes. Both have been thoroughly overhauled and brought up to date.

The marginal headings in *Gibson* have been eliminated, and they, with many new headings, are incorporated in the text. There is a new chapter, pp. 59–81, on Inquiries before Contract, which deals admirably with the Town and Country Planning Act, 1947, the numerous inquiries to the vendor that arise out of it, inquiries to local authorities, searches in the registers of land charges and other matters. Compulsory Sales forms a new chapter, pp. 247–254, which outlines the usual stages. The chapter on Bills of Sales, pp. 317–354, has been simplified and clarified. The other main additions are some 350 cases, the Agriculture Act, 1947, the Agricultural Holdings Act, 1948, the National Parks and Access to the Countryside Act, 1949, Leasehold Property (Temporary Provisions) Act, 1951, and the Finance Act, 1952, giving the stamp duty rates as from July 11, 1952. The book is made more useful than ever by footnote references to articles in legal periodicals and to Opinions of the Council of the Law Society. The references to *Mahon* v. *Ainscough* in the table of cases should be p. 59, not 5, and *Re Catling* p. 488, not 688. Mr. Kersley is to be congratulated on enhancing the reputation of this work; it is the best edition yet.

The format of *Burnett* is new and attractive. The general purposes and essential details of the Town and Country Planning Act, 1947, the Agriculture Act, 1947, and the Agricultural Holdings Act, 1948, are given a new chapter, pp. 210–221, and a new section on Inquiries before Contract appears at pp. 54–55. The practice of preliminary inquiries has been accelerated by the Planning legislation, and a fuller treatment seems desirable with more information on local land charge searches and inquiries to local authorities which are made prior to the exchange of contracts.

General principles are set out in clear and readable form, and one great feature is that simple examples are given of the effect of complicated sections of the statutes. *Weston* v. *Henshaw* [1950] Ch. 510 is worthy of reference on section 18, S. L. A., and at p. 22 the example of a married woman entitled to land subject to a restraint on anticipation should be deleted. At p. 52, is it necessary to refer to *Hunt* v. *Wimbledon Local Board*, for section 174 of the Public Health Act has been repealed by the Local Government Act, 1933, s. 266 and 11th Sched.? At pp. 62 and 71, although *Patman* v. *Harland* has ceased to be law, it might be well to remind the student that a duly registered land charge is actual notice. These are but trivial points in a textbook of exceptional merit.

T. E. L.

The Elements of Estate Duty. By C. N. Beattie, ll.b., of Lincoln's Inn, Barrister-at-Law. [London: Butterworth & Co. (Publishers), Ltd. 1952. xxiv and 194 pp. 22s. 6d. net.]

Mr. Beattie's introductory works on income tax are extremely lucid and accurate, and this book which he has now written on a subject having similar qualities of intractability and complication is equally successful in furnishing in a comparatively small compass a clear account, free from erroneous or misleading paraphrases, of the general framework of the law with which it deals. The book is intended primarily as a textbook for students. The author has therefore rightly concentrated his attention on the principles of estate duty, and the modern provisions designed to deal with schemes for avoidance of duty are mentioned but sensibly not examined in detail.

The primary difficulty in writing a students' textbook on a subject of statutory law, involving as here a great volume of detailed statutory provisions, appears to be that of preventing the book from becoming an indigestible catalogue of rules. This result may be avoided by illustration with examples, and by explaining the reasons for or origin of rules which do not form a logical part of the system. Mr. Beattie is ready with apt and simple illustration, but a few parts of the exposition might perhaps be improved by a little more explanation of the origins of the law. For instance more light might perhaps be thrown on the rules given for the ultimate incidence of duty by an examination of the statutory provisions giving a right of recoupment to a person paying duty, particularly as some students may well read and be justifiably puzzled by these disjointed provisions. A sentence or two devoted to explaining the basis for the rule in *Re Parker-Jervis* might similarly help.

In future editions, of which this book deserves to have very many, should not the explanation of why "property passing to the executor as such" is only the deceased's personal property in Great Britain, appearing at pp. 142–3, be brought forward or at least referred to where this phrase is first mentioned?

P. W. E. Taylor.

Green's Death Duties. Third edition by H. W. Hewitt, ll.b. (Lond.). The treatment of Legacy and Succession Duties revised by O. M. W. Swingland, ll.b. (Lond.), of Gray's Inn, Barrister-at-Law. [London: Butterworth & Co. (Publishers), Ltd. 1952. lxxx and 917 and (index) 46 pp. Supplement by the editor. 1952. viii and 11 pp. (Main work and supplement 75s. net, supplement only 5s. net.)]

The learned author is unhappily now no longer with us, but his work on death duties is assured for many years to come of a place amongst the leading textbooks. Since the last edition, in 1947, there have been several decisions concerning estate duty of a very far-reaching character; notably *Re Fitzwilliam*, in which the previously accepted foundations upon which the dutiability of dispositions *inter vivos* had been based were overturned, *Re D'Avigdor-Goldsmith*, *Re Brassey*, *St. Aubyn* v. *Att.-Gen.* (*No.* 2) and *Re Lambton*. The effect of these decisions has been skilfully incorporated in the work, although a considerable amount of rewriting has often been required. Legacy and succession duties have been abolished in regard to deaths and events occurring after the commencement of the Finance Act, 1949. The material relating to these duties has accordingly been condensed, and the repealed legislation transferred to a separate appendix. The section headed "Reserved benefit as consideration for a gift" at pp. 161–3 might perhaps be remoulded in the light of *Re Fitzwilliam*. Is the complicated analysis of the purchase of an annuity for an excessive consideration, falling substantially short of the capital required by its interest to produce the annuity, justified by the words of the 1894 Act and the authorities? In any event, if in the example given at p. 162 the deceased annuitant is to be regarded as retaining the income of £5,000 of the consideration transferred to the grantor of the annuity, must not the grantor equally be treated as receiving only a reversionary interest in that £5,000? Following *Re Bateman* [1925] 2 K.B. 429, the fractional allowance would then be in the ratio of £3,000 to the aggregate of £3,000 and the value of this reversionary interest.

P. W. E. Taylor.

The Principles of Income Taxation. By J. P. Hannan, ll.d., and A. Farnsworth, ll.d., ph.d. [London: Stevens & Sons, Ltd. 1952. lvi and 582 pp. 63s. net.]

The late Dr. Hannan's *Treatise on the Principles of Income Taxation* was published in Australia in 1946, and contained an exhaustive and critical analysis of the decisions of the United Kingdom and Australasian courts relating to the division for tax purposes of income from capital and other non-taxable receipts, and of allowable from unallowable outgoings in assessing profits. Dr. Farnsworth has in the present scholarly work adapted Dr. Hannan's book for publication in the United Kingdom by the omission of some features which were purely relevant to the Australian statutory law, and such of the original author's conclusions as cannot be supported in the face of United Kingdom authorities. He has added a more detailed examination of principles peculiar to the United Kingdom, and his own conclusions upon these. Every part of the book seems also to have been carefully revised, and where appropriate pruned or elaborated, and the post-1946 authorities have been incorporated.

The resulting work is one whose appeal is primarily to the specialist. Those who are not well versed in the content of the statutory law of income tax are indeed likely to be misled if they refer to the book without discovering the impact of any relevant statutory provisions by a perusal of the appropriate pages of one of the standard general works on income tax.

The first part of the book is concerned with the question "What is income?" A multitude of different kinds of receipt, lottery prizes, royalties, the proceeds of realisations and liquidations and others, are discussed in detail. There is a chapter devoted to "When income arises" and one on the territorial limits of income tax. The special position of employments transferred from Schedule D to Schedule E and *Turnbull* v. *Foster*, 6 T.C. 206, might perhaps have received some mention in this chapter. The rest of the book is devoted to allowable and unallowable expenditure. The extent to which the accepted principles of ordinary commercial accounting are embodied in the computation of profits of a trade for tax purposes is a subject on which it is difficult to reconcile the many expressions of judicial opinion which exist. But do the quotations at pp. 328–9 show the exercise of a further criterion that the deduction should be a "proper debit item"? Are they not instances of the rejection of the evidence offered in proof of the relevant accounting practice? The quotations in Chapter 27 (Accountancy Standards in Relation to Capital Expenditure) are more apposite in this connection. In another edition much of the contents of this chapter might be profitably brought forward to Chapter 23, where the question is discussed generally.

Why are the accounting principles to be considered not those of 1842, or perhaps it should be 1803 ? A historical examination of the commercial treatment of depreciation might provide a better explanation of the disallowance of deductions for depreciation than that of Dr. Hannan given at p. 325. Has not section 137 (*f*) of the Act some effect on this question ? Lastly, more space in a second edition might usefully be devoted to the force of " wholly and exclusively " in section 137 (*a*) having regard to recent decisions, and the contents of Chapter 29, which appears to add little, might be dispersed elsewhere. But these are comparatively small suggestions for improving the value of a book which is in its present form an important contribution to the learning upon this subject.

P. W. E. Taylor.

The Law of Income Tax. By E. M. Konstam, Q.C. Twelfth edition. [London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1952. lxxxv and 549 and (index) 82 pp. Supplement No. 1, September, 1952, by the author, 24 pp. 90s. net.]

Owing to the consolidation of the income tax enactments in the Income Tax Act, 1952, this new edition of Konstam became necessary although its predecessor was only two years old. The income tax provisions of the intervening Finance Acts and the effect of new decisions have been incorporated in it by the learned author with the same great care, conciseness and accuracy which have always characterised the work. This edition appears without a companion volume of statutes and regulations. Although at the moment the Income Tax Acts are comprised in two statutes only, the body of relevant provisions has in the past grown rapidly and been subjected to much annual amendment. There will accordingly be many who will regret this change, if it is to be also a feature of future editions. The same publishers' *Current Law Income Tax Acts Service* admittedly provides an up-to-date print of the statutory provisions and regulations, but it itself is a copiously annotated work and therefore a comparatively large and expensive one.

P. W. E. Taylor.

Handbook on the Income Tax Act, 1952. Prepared by Butterworths' Legal Editorial Staff. [London: Butterworth & Co. (Publishers), Ltd. 1952. x and 395 and (index) 100 pp. 27s. 6d. net.]

This volume, which was intended primarily as a companion to the first edition of *Simon's Income Tax* until a second edition

(now published) based on the Income Tax Act, 1952, could be prepared, consists of a short introduction, followed by a print of the Act of 1952, including a list in numerical order of its sections and schedules, a comparative table showing how the repealed legislation has been dealt with and the sources from which the new Act has been derived, and finally a relatively full index.

P. W. E. Taylor.

Simon's Income Tax. Second edition by the Rt. Hon. Viscount Simon, g.c.s.i., g.c.v.o., d.c.l., ll.d. (editor-in-chief) and editors and contributors. [London: Butterworth & Co. (Publishers), Ltd. 1952. In five volumes; Vol. 1: xix and 660 pp.; Vol. 2: xv and 696 pp.; Vol. 3: xv and 615 pp.; Vol. 4 (a loose-leaf volume containing the text of relevant statutes, statutory instruments, tables and official papers): lxviii, 480, 150, 59, 72, 173 and 94 pp.; Vol. 5 (Consolidated Index and Table of Cases and Statutes): not yet published. £15 15s. net for the set of five volumes; £2 12s. 6d. a year for the service.)]

The second edition of this encyclopaedic work on the law of income tax and profits tax has been necessitated by the consolidation of the Income Tax Acts in the Income Tax Act, 1952. This has provided an opportunity for revising the text of the expository volumes and incorporating the effect of new decisions and enactments. An appropriate section has also been added dealing with the excess profits levy introduced by the Finance Act, 1952. The section on the special contribution, having become obsolescent, has been omitted. In this edition each bound volume has been given a short index, and in the volume of statutes cross-references have been inserted to the portions of the text where the statutory provisions are discussed. These improvements certainly facilitate the adroit use of the work. The practitioner, whether a specialist in revenue law or one unwillingly drawn into its coils in connection with other matters, will already be acquainted with the excellent general qualities of the first edition, and this edition implements further the high standards which the work is designed to have.

P. W. E. Taylor.

Cases and Materials on Modern Procedure and Judicial Administration. By Arthur T. Vanderbilt, Chief Justice of the Supreme Court of New Jersey. [New York: Washington Square Publishing Corporation. 1952. xx and 1,390 pp. $8.50.]

Within a short period of editing *Minimum Standards of Judicial Administration* (reviewed in the last number of this Journal) Chief Justice Vanderbilt has produced a major work for students. The

author finds it necessary to explain why these matters should be studied in law schools. The starting point of the argument is the importance of procedure: it " is an integral part of every attorney's daily work, whether or not he is a trial lawyer. Even an office practitioner who never goes to court always works, or at least he always should work, with the thought that his labours may some day be put to the acid test of litigation." Yet procedure has been neglected and looked down on by students, teachers and practitioners. " The tradition of the early American law schools that procedure could best be learned through a clerkship in a law office . . . while attractive in theory, has long since proved untenable in practice." Hence procedure should be taught in law schools, where it should be " the core of the legal curriculum." The historical approach is abandoned in favour of the functional one based largely on the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. After an introductory chapter there is a reprint of Roscoe Pound's address in 1906 on " The Causes for Dissatisfaction with the Administration of Justice." The chapters then are: III. In what court may suit be brought—jurisdiction. IV. Who may sue whom—parties. V. Where may suit be brought—venue and transfer of cases. VI. How to get the defendant or his property into court—process. VII. What relief is sought—remedies. VIII. How to state controversy—the pleadings. IX. How to prepare for trial—pretrial procedures. X. How to litigate the controversy—the trial. XI. How to correct trial errors—judicial review. XII. How to enforce a judgment—execution. Then there are four chapters on judges, juries, legal profession and sundry matters of judicial administration. Maitland's *Forms of Action* is reprinted as an Appendix. The *Canons of Professional Ethics* and the *Canons of Judicial Ethics* adopted by the American Bar Association are reprinted with Court Calendars from the Martindale-Hubbell *Law Directory* for use as a companion volume.

An English reader cannot help making comparisons with our system. For some years we have regarded the " legal system " parts as being suitable for study in law schools, including in this part the organisation and jurisdiction of courts, judges, juries, the legal profession, and the growth of law by legislation and precedent. But in our view procedure should be learned as an articled clerk or pupil in chambers. I listened to Mr. Weldon (one of the best of law teachers) lecturing on procedure and found it a good course, but I was then an articled clerk and seeing a fair amount of litigation. The references to the English Legal Aid and Advice Act (at p. 1218) show that it is misunderstood; the author just assumes that government subsidy is a threat to the independence of the legal profession. " If the integrity of the legal profession and its future usefulness to the country as a whole is to be preserved, a determined stand must be taken against providing

legal aid at government expense." In fact the legal profession runs the legal aid service. Universities in England are mainly financed by treasury money, but we run ourselves without interference. I do not suggest that we have a perfect model, but we have not lost any professional independence or integrity. It may be that the author is right in thinking that in his country the problem of legal aid can be solved by voluntary work by the legal profession and by securing " moderate " charges, but one remembers that people used to talk that way in England.

If Chief Justice Vanderbilt's main argument is correct, and the conditions for teaching procedure in American law schools is something that he should know about for he was a law professor for many years, then he has written just the right book. The English reader obviously will not study all its many pages with equal care, but he will find a great deal of it most interesting and, perhaps unexpectedly, distinctly stimulating. I cannot think of anyone here who could produce a stimulating volume based on the *White Book*.

R. M. Jackson.

Leviathan and Natural Law. By F. Lyman Windolph. [Princeton, New Jersey: Princeton University Press. London: Geoffrey Cumberlege. 1951. ix and 144 and (index) 3 pp. 16s. net.]

A new faith is sweeping American legal circles—a faith in some higher law to which the State must bow. This book is one more in the growing series of books and articles intended to win over the American lawyer to the views of St. Thomas.

The author has been a practising lawyer for 40 years. He writes his book to show how he has come to believe in natural law, saying that he has founded his belief on the basis of positivism. He is candid in admitting that argument in this field profits little, for he says that refutation of Plato's Thrasymachus rests at bottom on an act of faith, and if one cannot make such an act of faith, the discussion in the book is not worth reading because there is nothing to discuss.

Mr. Windolph believes that the history of the English and American peoples proves that they have made this act of faith. He has found it possible to say " Unless we Americans have forgotten our revolutionary tradition, we cannot accept the proposition that, as a matter of morals, every command of the sovereign ought to be obeyed." To do so would require disowning the heroes in English and American history: the barons at Runnymede, Coke, William Penn and Washington.

The growing attack upon Mr. Justice Oliver Wendell Holmes is reflected in this book. The jurist upon whose legal opinions all

lawyers of the present generation cut their teeth is now being reviled by the natural law school. Mr. Windolph, in quoting some of Holmes' opinions, says: "There is music here, but it is not the music to which our fathers marched." The argument is that Holmes looked only to the opinions of mankind, while our forefathers never supposed that the opinions of mankind furnished a definition or even an ultimate test of the truths to the defence of which they had pledged their lives.

Those seeking to understand one of the important currents of thought in the United States will do well to look at this book. It is a representative statement of what many practising lawyers, aided by the men of the universities and by the religious orders, are coming to believe.

J. N. Hazard.

Handbook of Law Study. By Ferdinand F. Stone, Professor of Law and Director, Institute of Comparative Law in Tulane University. [New York: Prentice Hall, Inc. 1952. xi and 157 and (index) 7 pp. No price given.]

This is a well-planned, readable and interesting book, written for those who are "debating whether to study law, those preparing for law study, and those who have entered the law school and stand bewildered on the threshold." It has much in common with Professor Glanville Williams' admirable book, *Learning the Law*, but its scope is wider. It seems to deal with everything that its readers require in a sound and practical manner. It is so well stocked that a reviewer can only pick out a few matters—the factors to be considered in choosing a legal career, the qualities it demands, hints on pre-legal education, the function of law, and the interrelation of its parts. A practical account is given of the courts, judges, juries, trials, the functions of the legislators, executives and bureaus. The case-book and its use are considered and hints given on abstracting and establishing facts. The sources of law are outlined and help is given on the problem of abstracting the *ratio decidendi*, and how to qualify to make "the informed guess." The techniques of arguments are illustrated, and useful suggestions are offered on how best to cope with passing the examination. A final chapter deals with the basic principles of the ethical questions of legal practice. It is a fascinating little book, and there is need for a comparable one dealing with English law.

T. E. L.

The Colleges and the Courts, 1946–50. Judicial decisions regarding Higher Education in the United States. By M. M. Chambers. [New York: Columbia University Press. 1952. London: Geoffrey Cumberlege. 191 and (index) 10 pp. 20s.]

Dr. Chambers has continued in this volume his series of digests of cases touching upon education. For the British reader the collection has interest primarily because of the light it throws on the problems of education in a federal state with a mixed population. States' rights in the treatment of negroes, the interference of the state in the educational process, the financing of private educational institutions and the tenure of teachers are all problems of vital importance in the United States, yet they seem never to have existed or to have long since been resolved in the British University.

While most of the volume is but a well-organised digest with little comment from the author, some trends have been discerned by him. The negroes are achieving facilities for graduate and professional education substantially equal to those afforded white students; New York State's courts have begun to require a clear statutory guide to administrative authority when it is empowered to exercise discretion in the regulation of private schools; confusion still exists in the determination of exemption from taxation for private educational institutions; charitable trusts for educational purposes are being upheld against claims that the trust instruments are not sufficiently certain in their terms; and tort suits may lie against charitable institutions.

J. N. H.

Fourth Copyright Law Symposium. By N. Burkan. [New York: American Society of Composers. 1952. xvii and 178 pp. No price given.]

This is a set of four essays on copyright, selected from the prize-winners in an annual competition (the Nathan Burkan Memorial Competition) for American undergraduate law students. The first and best of the essays (by one Nimmer, of Harvard) deals mainly with the attitude of the United States courts to the problems of infringement of the copyright in literary works by dramatisation of them. These problems are difficult in any system of copyright law, and will stand a good deal of analysis. Mr. Nimmer fulfils admirably the requirements of the competition: to be original and impartial, while arguing strongly in the interests of composers, authors and publishers. Of the other essays, the second (on the

" compulsory manufacturing " section of the United States Copyright Act) is less original; the third, on " droit moral," is somewhat diffuse; the fourth, on the taxation of authors' earnings, is somewhat slight; but the general standard is very high.

T. A. Blanco White.

Das Schweizerische Zivilgesetzbuch in der ausländischen Rechtsentwicklung. By A. B. Schwarz. [Zurich: Schulthess & Co. A.G. 1950. 90 pp.]

The author, who has taught in Swiss and German Universities and who is at present professor of law in Istanbul, is admirably qualified to survey and assess the influence abroad of the Swiss Civil Code. After an examination of the outstanding characteristics of the Code, its language, style, and its practical rather than dogmatic approach, seen in the light of the three other leading European Codes, the French, the German and the Austrian, he turns to the reception of Swiss ideas in Europe, Asia and South America. He notes the attraction exercised by the structure of the Swiss Code and its guiding principles, and discusses their merits and their effect abroad. The section on the reception of the Swiss Code in Turkey shows comparative law in action, inasmuch it brings out the opportunities and obstacles which accompany the transplantation of a foreign legal system. In a final section, the author sums up his conclusions concerning the possibility of a European codification. The author's broad learning has enabled him, in this short reprint of an address, to present a summary, not only of the relevant features of Swiss private law and of their potential and actual value abroad, but of the essential unity of continental legal tradition.

K. Lipstein.

Lehrbuch des Völkerrechts. By Alf Ross. Göttinger Studien zum Völkerrecht und Internationalen Privatrecht, herausgegeben von Professor Dr. Herbert Kraus and Professor Dr. G. Beitzke. Vol. III. [Stuttgart and Cologne: Kohlhammer Verlag. 1951. 296 pp. D.M.20.]

The English edition of this textbook of international law written by the well-known Danish scholar was reviewed in this Journal, Vol. 10 (1949), pp. 305–6. The book was received with lively, if at times critical, comment in England and the United States. A leaning towards clear systematics, strict adherence to the dualist school, concentration upon the law of peace (excluding the United

Nations), economy in the citation of case law and, occasionally, a certain tendency to brush aside established principles, are its chief characteristics. The insistence of common lawyers that a text-book must aim primarily at presenting facts is thus not entirely satisfied, but this does not signify more than disagreement with the English and German title of the work. The Danish title seems to have been followed by the sub-title: General Part. (See Makarov in *Juristenzeitung*, 8 (1953), p. 62.) German lawyers, whose demand for introduction to international law has not been answered abundantly during the last three decades, will find that the book responds to their requirements, combining as it does a strong theoretical bent with much technical information set out in general propositions rather than by way of an account of individual cases and incidents.

K. Lipstein.

A Manual of German Law. Vol. 2. Private International Law, Civil Procedure, Criminal Law, Criminal Procedure. [London: H.M. Stationery Office. 1952. xv and 162 and (index) 5 pp. 21s. net.]

The first volume of this exposition of German law, covering private and commercial law, was reviewed in this Journal, Vol. 11 (1951), pp. 161–2. The second volume concludes this work by a treatment in outline of criminal law and procedure, civil procedure and private international law. It is no mean achievement of the authors to have done so in little more than 150 pages. The reader obtains a clear picture of the German rules, accompanied by occasional comparisons with English law. Aspects of a more theoretical character, which present themselves in criminal and private international law, are of necessity treated in a more cursory and even telescoped manner. Problems of terminology and wording loom large (*e.g.*, p. 11, s. 26; p. 16, s. 43; p. 16, s. 46; p. 79, s. 1; p. 81, s. 27; p. 103, s. 98), owing to the requirements of brevity (see *e.g.*, p. 104, s. 99; p. 107, s. 108). The need to produce this manual quickly is no doubt responsible for a number of minor typographical and material errors. Thus, on p. 26 (s. 83) the Adoption Act, 1950, s. 16, should have been taken into account. The example of *Untreue* (p. 115, s. 125) is not clear. *Notzucht*, not *Nötigung*, is the equivalent of rape (p. 118, s. 136).

But these are small blemishes. The authors have proved that it is possible, within limited space, to set out the principles of a foreign legal system in a manner which is both scholarly and adapted to the needs of foreign lawyers.

K. L.

Verfassungswidrige Verfassungsnormen? By Otto Bachof. Recht und Staat, Vols. 163–4. [Tübingen: J. C. B. Mohr (Paul Siebeck). 1951. 61 pp. D.M.3.80.]

The subject of this inaugural lecture by a member of a German administrative tribunal is a problem which is unfamiliar both to English and to American lawyers. It is whether individual rules of the Constitution of the German Federal Republic can be declared unconstitutional on the ground that they conflict either with certain inalienable principles laid down as immutable by the Constitution itself, or with unwritten principles which form the basis of the Constitution. A positive solution of this problem is here attempted which relies in part upon the recent somewhat negative attitude of German administrative courts. In the main, the author bases his affirmative conclusions on deductive legal reasoning of considerable subtlety. Whatever view is taken, the problem whether fundamental laws should be immutable and incapable of modification, in their application to special problems, even within the framework of the original Constitution is, in the end, a problem of policy.

K. L.

Suomen Lainopillinen Kirjallisus (Littérature Juridique de la Finlande) 1809–1948. By Veikko Reinikainen. [Helsinki: Suomalainen Lakimiesyhdistys. 1951. xxxv and 857 and (index) 186 pp. Finnish Mk. 4.730.]

This volume, published under the auspices of the Finnish Law Association, is the result of an ambitious undertaking to collect in systematic form the entire legal literature which has appeared in Finland since 1809. It covers not only books, and articles in law reviews, but also official publications. Its comprehensiveness is illustrated by the section in which the place of publication of each judgment is traced, if it has been reproduced in a periodical. Lawyers in other countries may well envy their brethren in Finland for having a bibliography at their disposal which, unfortunately, cannot be emulated elsewhere.

K. L.

Administrative Agencies and the Courts. By Frank E. Cooper, of the Detroit Bar, Visiting Professor of Law, University of Michigan Law School. [Ann Arbor, University of Michigan Law School. 1951. xxv and 470 pp. Price not indicated.]

This is the latest publication in the series of Michigan Legal Studies. Mr. Cooper sets out to survey the whole field of judicial control of

administrative powers in the U.S.A., and as he proceeds one admires his ability to give so straightforward an account of it, without being drawn into controversial digressions. It is the very plainness of the work which makes it so instructive to an English reader, for here is a comprehensive and carefully arranged text in which the counterparts of all the familiar English problems can be found and compared. The method is analytical, yet detached, and the author keeps his head well above the clouds of conflicting decisions and polemical literature in which the subject is rich to superfluity. His text will not therefore be found exciting, but its utilitarian value, at any rate for comparative purposes, is bound to be high. The book is primarily a statement of principles, and the author's comments, though plentiful, are notable for their moderation and common sense. Clearly he is neither among the wolf-criers nor among those who are more executive-minded than the executive itself.

Two minor criticisms are offered by a foreign reader, who perhaps has only his own ignorance to blame. First, there are few particulars about the Administrative Agencies themselves, *i.e.*, about their constituent statutes, powers and functions, which are of course of vital importance to most of the legal issues discussed. No doubt this is constitutional general knowledge which American readers may be assumed to have. But the need is the greater because of a second lacuna: the number of decided cases discussed in any detail in the text is very small, and in general even the leading decisions appear only as footnote references, with no mention of their facts. It is therefore easy for the reader to miss a striking point for want of illustration. But an American student, turning from casebook to textbook rather than vice versa will perhaps be less disposed to complain.

Comparisons are tempting, though Mr. Cooper himself says nothing of the law in England. Administrative law in America has at least four fundamental elements which are absent here. First, the separation of powers effected by the Constitution gives each organ of government a kind of "constitutional prerogative," so that there are limits to the power of the legislature to invade the provinces either of the courts or of the executive. Secondly, there is the "due process" provision, by which rules analogous to the English "natural justice" are entrenched more firmly than here. Thirdly, there is the peculiar character of the legislation which the American agencies administer, which leaves the boundaries of their discretion so hazy (for example, enactments that "unfair methods of competition" and "unfair labour practices" are illegal). And lastly, there is the Federal Administrative Procedure Act, 1946, which Mr. Cooper prints in an appendix. Yet, despite all these advantages, the impression left by Mr. Cooper's narrative is that the American rules for judicial control are hardly

more positive than our own. This is not for want of first principles, but because the present current of judicial opinion flows "in the direction of reducing the scope of review," and because of "the growing deference paid to administrative determinations," even on questions of law. Despite much elaboration of the concept of "due process," "the fundamental principle is only that the rudimentary requirements of fair play be observed." It is true that American law gives various rights which the House of Lords has denied, for example the right to an oral hearing, and the right to see in advance the agency's evidence (*e.g.*, an inspector's report) on questions of fact; though this latter rule is "a source of perennial difficulty." There is also the salutary rule, conspicuous by its absence in England, that "substantial evidence" must be given at the hearing in support of the agency's findings of fact. No finding of fact can therefore be purely subjective, and one may surmise that this rule would defeat a formula like "if the Minister is satisfied," which in England is judge-proof. Nevertheless there are hints that these safeguards are more formal than real, and the special type of jurisdiction which the American agencies wield lends itself more easily to a formal procedure than do the heterogeneous Ministerial powers exercised in England. American experience does not indicate that it is easy to make good administrators by statute; it rather proves how elusive are the terms in which constitutional rights are enshrined, and how on occasions the forms of justice can be emptied of their substance. For example, the American courts (like our own) recognise no general rule that "the one who decides must hear"; and "frequently (Mr. Cooper says) the hearing officer is no more than a monitor, without effective power even to keep order at the hearing or to supervise the recording of the evidence, his position in some instances being shockingly similar to that of a notary public before whom a deposition is taken." It remains to be seen whether the Federal Administrative Procedure Act will remedy this grievance, which calls to mind an English Attorney-General's remarks about "blowing off steam." This Act receives only passing references in the text, and possibly the author is one of those who doubt whether it will bring about any revolution in the standards of administrative justice.

English courts still preserve the doctrine of *ultra vires* fairly strictly; but in America, if the reviewer does not misread a particularly interesting passage, there is a tendency for judges to abrogate their powers of control where the issues of fact seem to them more suitable for departmental determination. What is remarkable here is that the courts do not deny that they possess the power of review, but "as a matter of comity and convenience" they elect not to exercise it. Thus by self-denial the courts may decline to investigate even the facts on which the administrative power depends ("jurisdictional facts"), or the facts which might establish a violation of the constitution ("constitutional facts");

and there are similar reservations about issues of law. Thus the American courts are developing a kind of administrative jurisprudence of their own, and paying marked respect to the agencies. One would not have expected to find in America this leaning towards *droit administratif*, in Dicey's peculiar sense of the term. But it may be that in this way the courts will be able to bow to necessity more gracefully than in England, where our more rigid concepts mean that changes of judicial policy can be made only by breaking sharply with previous case law, as in the *Liversidge* and *Franklin Cases*.

The chapters on delegated legislation ("rule making") show that most of the problems of this subject are the common lot of both countries. Those who think hardly of the English Rules Publication and Statutory Instruments Acts may be consoled to know that the American Act of 1935 (the first Federal Act on the matter) provides only for the publication of such classes of documents "as the President shall determine from time to time to have general applicability and legal effect." In this department also the rules of judicial control are amorphous: "like the maxims of equity, they are not to be overlooked, but still are not to be taken as touchstones to the decision of any particular case."

The reviewer has stressed the lessons which remain with him most strongly: that underneath the elaborate forms of the administrative law of the United States there lie no fewer conflicting principles and impalpable definitions than those which beset the subject in England; and that the American courts are taking it upon themselves to work out a *modus vivendi* between judicial and administrative power. To dwell on these things alone may give a distorted impression of Mr. Cooper's methodical and balanced survey. They are merely a few of the points that are of outstanding interest to an English reader of this most useful work.

H. W. R. W.

Law and Social Change in Contemporary Britain. By W. Friedmann, LL.D.(London), DR.JUR.(Berlin), LL.M.(Melbourne), of the Middle Temple, Barrister-at-Law, Professor of Law, University of Toronto. [London: Stevens & Sons, Ltd. 1951. xxiv and 313 and (index) 8 pp. 37s. 6d. net.]

This is a stimulating account of modern social developments upon portions of the common law, and how our traditional system copes with the problems raised by the extension of public law into fields which were formerly regarded as private law. It shows that solutions are to be found by considering the social purposes that statutes are designed to serve. Lord Justice Denning in his Foreword states that the great merit of the book is that it shows the pattern of legal

development against its social background. Its main divisions are—The Common Law in a Changing Society, Public Law in Contemporary Jurisprudence, Statute Law and the Welfare State and the Welfare State and the Rule of Law. Every chapter brings out salient points of comparison between Continental, English and Commonwealth systems. It shows the vital modifications of public law on private bargains by standardised contracts and collective bargaining, the changing function of the law of tort as a reasonable adjustment of economic risk and not the expression of certain absolute moral principles. The *Harris Tweed Case* (1942) is critically analysed and regarded as the burial of the tort of conspiracy, for its field is being overshadowed by extra-judicial and statutory developments. Public Law is treated under the problems it has raised in recent decisions and their solution, in most cases, within the adaptable framework of the common law; the Status and Organisation of the Public Corporation—an institution deliberately designed to integrate public enterprise with the common law, and Declaratory Judgment and the Injunction as Remedies—a haphazard adoption of old remedies to new purposes instead of a scientific development of administrative law. The changed attitude in the interpretation of statutes with a social objective is illustrated with examples and means are indicated whereby the reconciliation of planning with democratic principles may be achieved. Each chapter shows a detailed examination of statute and case law indicating that modern development must not be stultified by too close an adherence to decisions suitable to an older and different state of society.

T. E. L.

The Constitutional Law of Great Britain and the Commonwealth. By O. Hood Phillips, M.A., B.C.L.(Oxon.), of Gray's Inn, Barrister-at-Law; Dean of the Faculty of Law, Director of Legal Studies and Barber Professor of Jurisprudence in the University of Birmingham. Assisted by G. Ellenbogen, M.A., Sometime Foundation Scholar of King's College, Cambridge; Barstow Scholar; Bacon Scholar of Gray's Inn and of the Northern Circuit, Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1952. xliv and 798 and (index) 27 pp. 42s. net.]

This is a revised edition of the book which we had the pleasure of reviewing in 1946 under the title Chalmers and Hood Phillips' *Constitutional Laws of Great Britain, the British Empire and Commonwealth*; but it is very much more than a new edition, for Professor Hood Phillips has, by rewriting and completely revising the whole of the material, produced what is really a new book.

And although this has necessitated an increase in the size of the book by a hundred pages, we do not share the author's regret that this has happened. Indeed, we think that the student of this subject normally encounters difficulties because of insufficient explanation and illustration. Herein lies the great merit of this book, that the author exercises the greatest patience and care in leading his reader through the most difficult topics and never leaves him with a feeling of being lost. The subject of Administrative Law is generally viewed by students with the interest they show in thrice-boiled cabbage, but we believe that the author's treatment (chapters 19–24) of this subject brings to it a freshness and lucidity of great value. There are many features of the book which make it attractive reading, not the least of these is a lightness of touch in subjects which can be tedious; we think it right, for example, that the student should know that he can see Danby's letter at the British Museum (p. 69), that it was pile-driving that drove the Law Lords to a Committee Room' (p. 68), that it was Lord Jowitt and not Tennyson who questioned Lord Raglan's liability under the Crown Proceedings Act (p. 382) and that a clergyman is forbidden to farm more than 80 acres without his bishop's leave (p. 435). Moreover, the good student is put on the track of a wealth of legal literature and articles in learned periodicals; these references are exceedingly valuable and are in themselves evidence, if any were needed, of how far the author has cast his net. We have made extensive use of the chapters (37–46) on the British Commonwealth and have found them to be a mine of valuable information most lucidly presented.

Any criticism we have to offer must appear churlish in view of the author's efforts and success in producing so excellent a book. We might be allowed to suggest, however, that the treatment of the Crown's liability which is dealt with in two separate places (pp. 373 and 400) might be brought together; that a reference to the Common Informers Act, 1951, might be brought in (at p. 107) with a warning that it does not cover the cases brought as a result of *Re Sir Stuart Samuel* (p. 99), and a reference to those cases—*Forbes* v. *Samuel* [1913] 3 K.B. 706, *Burnett* v. *Samuel*, *ibid.*, *Bird* v. *Samuel*, 30 T.L.R. 323, might be incorporated at the same place. It may be, too, that the author will have to reconsider his statement (at p. 343) that the courts have recently shown a tendency to narrow the scope of the remedies provided by certiorari and prohibition, for *R.* v. *Manchester Legal Aid Committee* [1952] 1 All E.R. 480 may indicate a change of mood.

We have nothing but admiration and enthusiasm for this excellently written, comprehensive and accurate book which will do much to encourage the study of Constitutional Law.

T. C. T.

Leading Cases in Constitutional Law. By O. Hood Phillips, M.A., B.C.L.(Oxon.), of Gray's Inn, Barrister-at-Law, Dean of the Faculty of Law, Director of Legal Studies and Barber Professor of Jurisprudence in the University of Birmingham. [London: Sweet & Maxwell, Ltd. xxi and 469 pp. 35s. net.]

This casebook is intended as a companion volume to the author's textbook on Constitutional Law which is reviewed above and to each case there is a reference to the appropriate chapters in the textbook. There are extracts from 112 cases illustrating principles relating to Parliament, the Prerogative, the Rights and Duties of the Citizen, Public Authorities, the Administration of Justice and the British Commonwealth. New cases added since the last edition appeared in 1947 include *Christie* v. *Leachinsky*, *Franklin* v. *Minister of Town and Country Planning* and *Campbell* v. *Hall*; and some of the old cases, now obsolete since the passing of the Crown Proceedings Act, 1947, have been omitted. We believe that it will serve the author's purpose admirably—namely, to guide and stimulate the student to the reading of Law Reports and Statutes.

T. C. T.

Principles of Administrative Law. By J. A. G. Griffith, LL.M., Lecturer in Administrative Law in the University of London, of the Inner Temple, Barrister-at-Law, and H. Street, LL.M., PH.D., Senior Lecturer in Law, University of Manchester, Solicitor of the Supreme Court. [London. Sir Isaac Pitman and Sons, Ltd. xxxiii and 308 and (index) 7 pp. 30s. net.]

The authors, who are both distinguished teachers of the subject-matter of this volume, consider that Administrative Law now claims a place as a compulsory subject in both University and Professional examinations. Not all teachers will go all the way with them on this point, but even those timorous souls will grant that the subject is outstanding in providing illustrations of the conflicting interests of the individual and the public, of the interrelation of legal, social and economic ideas and of the working of the judicial process.

Though it is directed to a wider audience, its particular merit is that it provides the student, for the first time, with a comprehensive study of a subject which he regards as peculiarly difficult. His difficulties are usually concerned with terminology, lack of boundaries and the general disorderly conduct of elusive principles. It is these very difficulties that the authors have in mind throughout and their treatment of them will serve to assist him in the solution of them.

The substantive material might be said to fall into a fourfold division. After an introductory chapter on general principles and definitions, the authors deal, first, with Delegated Legislation, indicating the types and subject-matter of subordinate legislation. There follows an analysis of the methods of control of these legislative powers—through parliamentary and judicial control and by consultation with affected interests. Secondly, the book deals with the Administrative and Judicial powers of the Administration, followed by a chapter on the appropriate methods of review and control available in such cases. Thirdly, there is a most valuable chapter on suits against the Administration (including proceedings against the Crown), and in the last chapter there is an appraisement of the constitution and functions of Public Corporations. (We might interpose here to say that while sympathising fully with the author's difficulties over printing in full the titles of some of these Public Corporations, we have a sneaking sympathy for the reader who plunges into the middle of this chapter. For he will read (at p. 278), "This provision applies to the N.C.B., the Air Corporations and the A.L.C. For the B.T.C., B.E.A., G.C. and Area Gas Boards and the C.L.B., there is a similar provision . . ."; and (at p. 279), "The R.H.B.s, A.L.C., C.L.B., and D.C.s, not being money-making concerns, are in a different category." No doubt we shall get as used to all this as we are to the B.B.C., but it is all rather exhausting.)

The authors are not content with mere descriptive, explanatory and illustrative material, valuable as these are to the student. They proceed to make most valuable and stimulating suggestions which are warnings and signposts to be heeded. In particular, they suggest that parties appearing before tribunals should be able to invoke the assistance of the tribunal in procuring evidence and that unless reasons for decisions are given, any right of appeal is rendered nugatory. On delegated legislation, too, there will be wholehearted support for their suggestion that departments should be less reticent in disclosing information about proposed orders, for it is only if such information is available that there can be any real examination or any constructive criticism which could follow upon such examination.

T. C. T.

Comments, Cases and Materials on Legislation. By A. Lenhoff. United States Case Book Series. [Buffalo, N.Y.: Dennis & Co., Inc. 1949. xxxvii, 1023 and (index) 21 pp. (N.P.)]

The approach of the common and of the civil law to the problem of interpreting statutes has always been regarded as differing in method and purpose. The present annotated casebook shows that this impression is misleading, at least in so far as the United States are concerned. Here the Federal Courts have been increasingly

concerned with Statutes and less and less with the common law as in force in the United States. The range of the book is very wide, comprising not only (in Part II) those topics which English lawyers usually regard as problems of interpretation, but also (in Part I) the relation between statutes and the constitution, publication proof and clerical errors, *ex post facto* and retroactive legislation, revision and codification, legislation by reference, delegated legislation, the meaning of statutory standards for personal conduct (*e.g.*, reasonable, equitable) and the technique of legislation. Other sections deal with subjects which, at first sight, would appear to be outside the ambit of interpretation proper, such as the effect of judicial changes in the interpretation of statutes or the characterisation of statutes as taxing or penal statutes for the purpose of the Constitution. Although the book purports to be concerned with a technical problem, constitutional, administrative, tax and even criminal law and the law of contract are thus touched upon almost constantly. For English lawyers, brought up on *Maxwell* or *Craig*, a treatise on interpretation of statutes is necessarily an enumerative catalogue, presented in systematic form. A casebook, however systematically arranged and annotated, fulfils a didactic purpose. Yet cases cannot be divorced from the question of substantive law which they decide, and a casebook on interpretation is thus, of necessity, a collection of decisions drawn from all branches of law from which the student must learn, as well as he can, a specific legal technique. It is difficult to conceive how he can do so without the guidance of a teacher, and the present book is primarily the basis of a course on legislation. As such it is a novel enterprise of considerable interest, but it cannot hope to form a substitute for the treatise on interpretation in Anglo-American law, which is as yet unwritten.

K. Lipstein.

Current Legal Problems. 1952. Vol. 5. With Cumulative Index to Volumes 1–5. Edited by George W. Keeton and Georg Schwarzenberger on behalf of the Faculty of Laws, University College, London. [London: Stevens & Sons, Ltd. 1952. vii and 323 and (tables of cases, statutes and treaties) 9 and (index) 7 pp. 37s. 6d. net.]

These 15 lectures cover a varied field of International Law and English public and private law. Mr. Cheng deals with the International Law Commission created in 1947 for the progressive development of international law and its codification, its methods of approach, its actual work and its difficulties. Mr. Green writes on the Legal Aspects of the Schuman Plan and the problems it raises in connection with international treaty law. Professor Schwarzenberger deals with the Protection of British Property

Abroad, its historical perspective, recent treaty practice, the Anglo-Iranian dispute, means of obtaining redress and the outlook for investments abroad. Lord Justice Denning has a valuable and stimulating contribution on the Need for a New Equity. The Courts of Chancery are no longer courts of equity mitigating the harshness and softening the rigidity; the law must develop to redress new wrongs and solve the problem of preserving a true balance between certainty and justice. Professor Keeton deals with the cases raising problems on the Director as a Trustee. Mr. Scammell discusses Nationalisation in Legal Perspective; it is well documented, and points out some of the legal shortcomings—"It may be that the history of feudalism in this country will to some extent be repeated in the history of nationalisation," p. 54. Mr. Fitzgerald deals critically with the Law and Ethics of the Compulsory Acquisition of Land, compulsory powers should never violate the maxim: Be not covetous, do not steal, p. 80. Dr. Marshall, in Hospitals and the National Health Service Acts, considers the problems involved in the law of property and in tort. Mr. Holland deals skilfully with the High Court Control of Inferior Tribunals, the unsatisfactory and uncertain remedies of prohibition and certiorari, and gives proposals for reforms. Professor Glanville Williams states the present legal position of induced Abortion, with particular reference to *R.* v. *Bergmann and Ferguson* (Central Criminal Court, May, 1948) and leaves one in no doubt as to the necessity for legislative change for "the effect" of the law is not to eliminate abortion but to drive it into the most undesirable channels, p. 141. Mr. O'Sullivan writes charmingly on Officialdom and Infancy, the statutes and statutory instruments that threaten the pattern of family life, but the latest aim is to insure that deprived children should have the affection and security of a true home, rather than that of a local authority which is a "fit person," pp. 53, 165. Reform of the Law of Libel is discussed by Mr. Dennis Lloyd, and Mr. Payne, dealing with the Direct Consequences of a Negligent Act, persuasively argues that the House of Lords may reject the *Polemis* rule, pp. 206–7. Mr. Ivamy tackles intricate problems on Hire Purchase Law, particularly the conflict of interests between the owner and third parties. Mr. Powell compares the Anglo-American systems and the Roman systems in dealing with the Roman Contributions to the Reform of English Law and pleads for a wider use of foreign experience. These disjointed comments will serve to indicate that this volume contains material to suit the tastes of the practising and academic lawyer—it is rich and refreshing.

T. E. L.

Select Legal Essays. By Sir P. H. Winfield, Q.C., F.B.A., LL.D., Emeritus Professor of English Law, Cambridge, Fellow of St. John's College, Cambridge; of the Inner Temple, Honorary Bencher and Barrister-at-Law. With an Editorial Preface by S. J. Bailey, Rouse Ball Professor of English Law in the University of Cambridge. [London: Sweet & Maxwell, Ltd. 1952. xv and 287 and (index) 5 pp. 37s. 6d. net.]

This collection of legal essays, seven on tort, three each on contract and quasi-contract, and two on public policy and ethics is but a small fraction of Sir Percy Winfield's considerable contribution to the literature of the common law. The editors have made a judicious selection, 10 from the *Law Quarterly Review*, two each from the *Columbia* and the *Harvard Law Reviews*, and one from the *Cambridge Law Journal* ranging over the period April, 1919 to January, 1948. The author has made the fields of quasi contract and tort his own, he was the architect of the tort of negligence, and these delightful studies will remain of permanent value for they illustrate convincingly the important contribution which history has made in the formation of modern common law doctrines. The style is elegant and effective and work of a real master needs no commendation.

T. E. L.

The Law of Agency. By Raphael Powell, M.A., B.C.L.(Oxon.) of the Middle Temple, Barrister-at-Law; Reader in Law in the University of London. [London: Sir Isaac Pitman & Sons, Ltd. 1952. xliv and 339 and (index) 15 pp. 40s. net.]

The Principles of Agency. By Harold Greville Hanbury, D.C.L. Vinerian Professor of English Law in the University of Oxford, Fellow of All Souls College; Hon. Fellow of Lincoln College; Hon. Master of the Bench of the Inner Temple. [London: Stevens & Sons, Ltd. 1952. xviii and 231 and (index) 5 pp. 25s. net.]

Powell on Agency is an "entirely new venture," a detailed and scholarly analysis of the complex concept of agency, suitable for the practising lawyer and the advanced student. It is a critical and comprehensive study of the authorities and literature—English, American and Canadian—and the problems, both theoretical and practical, are thoroughly tackled. The introductory chapter of some 30 pages deals with the difficulties of defining an agent, the interrelation between agents, servants, independent contractors and bailees, and it deprecates the distinction between general and special agents as tending to confuse issues involved in particular cases. Chapter II covers 70 pages under a title of convenience—

agent's authority, analysing authority—express, implied and usual, the basis of the principal's liability for unauthorised acts, and notice of want of authority. The distinction between the power and the authority of the agent is well brought out at pp. 48–50. Chapter III, of some 20 pages, is devoted to ratification, and Chapter IV, of 80 pages, concerns the relation between principal and third party under the heads of contracts, torts, unauthorised dispositions of property, unauthorised borrowing, notice to agent, and the admissibility of the agent's statements in evidence. In Chapter V, 25 pages are devoted to the relation between agent and third party, Chapter VI, 18 pages, deals with criminal liability, and in Chapter VII, 70 pages complete the detailed relation between principal and agent. Chapter VIII in its 27 pages covers the termination of authority and a final short chapter deals with agency of necessity. The whole book is so well done that it is difficult to single out matters of outstanding quality, but mention may be made of the discussion of Devlin J.'s decision in *Armstrong* v. *Strain* (1951)—innocent division of the ingredients of deceit—p. 167; fraudulent misrepresentation in general, pp. 161–9; secret profits and bribes, pp. 255–61; the remuneration of estate agents, pp. 278–95; and the evaluation of *Luxor (Eastbourne), Ltd.* v. *Cooper* [1941] A.C. 108 and *Dennis Read, Ltd.* v. *Goody* [1950] 2 K.B. 277; liability for negligent misstatement—*Candler* v. *Crane, Christmas Co.* [1951] 2 K.B. 164 at pp. 54–55, and pp. 329–40 dealing with implied authority of necessity, *negotiorum gestio* and quasi-agency.

Professor Hanbury's book contains the essence of lectures delivered to Oxford law students and is a concise analysis and masterly exposition of the principles of the English law of agency in contract, tort and crime, and—a novel feature—agency in the law of evidence. It is noteworthy for the scholarly interpretation of recent cases, those referred to in the previous review, and particularly *Pearson* v. *Rose and Young* [1951] 1 K.B. 275 (mercantile agent, car and log book, pp. 113–5), *Novarro* v. *Moregrand* [1951] 2 T.L.R. 674 (Denning L.J.'s differentiation of liability of principal in contract and tort, pp. 186–7) and vicariously signed memoranda and vicarious admissions, pp. 222–31. *Smith* v. *Moss* [1940] 1 K.B. 424 does not commend itself to the author, but it was followed recently in *Broom* v. *Morgan* [1952] 2 All E.R. 1007. This is an excellent book for students, and practitioners will find it useful for its well-reasoned opinions on doubtful points.

T. E. L.

Current Law Consolidation. I. 1947–1951. General Editor: John Burke, Barrister-at-Law. Consolidation Editor: Clifford Walsh, ll.m., Solicitor of the Supreme Court. [London: Sweet & Maxwell, Ltd., and Stevens & Sons, Ltd. 1952. dclxxvii and 2098 and (index) 53 pp. £9 9s. net.]

THIS is an outstanding contribution to lighten the lawyer's labour and to ensure that nothing is overlooked. It is a massive but easily manageable volume consolidating the *Current Law Year Books* 1947 to 1951 inclusive, covering not only English authorities but with hundreds of references to Scottish, Irish, Canadian, Australian, New Zealand and South African decisions on points of English law, and numerous county court decisions where there is no other authority. The decisions of numerous Tribunals and Commissions relating to administrative law are given the importance they deserve. It summarises and indexes everything; all the reported cases, statutes, rules and orders, and practice notes and directions. The 11,123 numbered paragraphs summarise the whole of the law under appropriate headings with copious cross references, and the 1,293 entries under "Words and Phrases" help to track down the elusive case. The most notable and useful features are the Statute Citator and the Case Citator. The former is a complete Noter-up to the Statute-book and comprises, in a single table, the statutes passed during the period and the statutory instruments, cases on the construction of statutes and legal literature, and statutes amended, applied or otherwise affected by legislation from 1235 to date. The Case Citator contains, in a single table, cases reported during the period and digested, cases judicially considered, cases overruled by statute, and cases the subject of articles in legal periodicals. There is also a Citator of Statutory Rules and Orders and Statutory Instruments, 1947–1951. This is a monumental work, planned to give the maximum of information on all the law from every source, with the minimum of trouble, and a guarantee against oversight and error.

T. E. L.

The Law of Contract. Third Edition. By G. C. Cheshire, D.C.L., F.B.A., of Lincoln's Inn, Barrister-at-Law, Reader in the Law of Real Property to the Council of Legal Education, and C. H. S. FIFOOT, M.A., of the Middle Temple, Barrister-at-Law, Fellow of Hertford College, Oxford, All Souls Reader in English Law, Lecturer in Common Law to the Council of Legal Education. [London: Butterworth & Co. (Publishers), Ltd. 1952. lxi and 545 and (index) 31 pp. 42s. net.]

EVERY chapter in this excellent book shows thorough revision and the spate of judicial decisions has involved an additional 50 pages. Among the many new features one may note but a few, the new introduction at pp. 19–24 showing the influence of economic conditions on the modern law with its mass-produced standardised contracts; quasi-estoppel and the clarification of consideration by the Court of Appeal in *Combe* v. *Combe*, pp. 74–77; and the *Victoria Laundry Case* on damages, pp. 492–8. The chapter on Mistake has

been virtually rewritten, the effect at common law and in equity of the three types of mistake is elaborated in detail and clarified; the interpretations of *Bell* v. *Lever* are critically examined in the light of *Solle* v. *Butcher* and *Leaf* v. *International Galleries* at pp. 178–81, and there is a critical and constructive review of innocent misrepresentation and mistake at pp. 248–52. On the question of frustration preference seems to be given to the views of the Court of Appeal on "the absolving power," p. 461, despite strong statements made in the House of Lords in *British Movietonews, Ltd.* v. *London and District Cinemas, Ltd.*, pp. 459–60.

Anson's principles of the English Law of Contract. Twentieth edition. By J. L. Brierly, d.c.l., of Lincoln's Inn, Barrister-at-Law. [Oxford: Clarendon Press. 1952. xxxvi and 446 and (index) 9 pp. 25s. net.]

Anson was designed for beginners as an elementary treatise "tracing the principles which govern the contractual obligation from its beginning to its end, dealing with them in outline only, not citing too many cases and using them to illustrate general rules." Dr. Brierly has ensured that it continues to serve these purposes, and has incorporated the changes made by leading decisions since the previous editions. The main new material appears in the following pages—consideration, 102a and b; married women, 117, 142–3; mistake, 157; misrepresentation, 195, 195a and b; gaming, 211a and b; a very guarded statement on construction based on *British Movietonews* (since reversed by the House of Lords), 301; frustration, 357, 357a; and damages, 364–66b.

Kerr on the Law of Fraud and Mistake. Seventeenth edition. By D. L. McDonnell, o.b.e.,, m.a. of the Middle Temple, and J. G. Monroe, b.a., of the Middle Temple and Lincoln's Inn, Barristers-at-Law. [London: Sweet & Maxwell, Ltd. 1952. liv and 686 and (index) 52 pp. £6 6s. net.]

The first edition appeared in 1868, the sixth in 1929. The editorial burden of incorporating the effect of some 30 statutes and a welter of decisions has been an unusually onerous one. There has been a fundamental overhaul and the lay-out is vastly improved. Instead of the former Part I on Fraud and Part II on Mistake, with all its repetitions, the book is now a composite whole on fraud, misrepresentation and mistake. Chapters VII to XIII, which deal with special cases of fraud and mistake, unite what were formerly different parts, and this applies to Chapter XVIII on remedies. The text has been further sub-divided and good use has been made

of heavy type. Much rewriting has been done in Chapter V on Constructive and Imputed Notice and Chapter XIX on Third Parties. Though no clear line has been drawn between mistake of fact and mistake of law the doubts and conflicting decisions are carefully weighed at pp. 133–49. *Bell* v. *Lever*, *Solle* v. *Butcher*, *Leaf* v. *International Galleries*, *Candler* v. *Crane Christmas* and *Armstrong* v. *Strain* occupy a prominent part in the book and the provisions of the Limitation Act, 1939, and the Companies Act, 1948 are given full treatment. A Table of Statutes has been added. The editors have performed a difficult task with great skill and have enhanced the reputation of *Kerr*.

Books also received:—

Problems of Parliamentary Government in Colonies. A Report prepared by the Hansard Society on some of the problems involved in developing parliamentary institutions in colonial territories. The Hansard Society. x and 106 and (appendices and index) 47 pp. (12s. net.)—To those who are in any way interested in problems of colonial development, this survey is a most useful and topical introduction to the many and varied difficulties—legal, political and economic—which have to be resolved. The report examines how far, if at all, British parliamentary institutions are suited to meet the requirements of colonial peoples. Reference is made to the more important ideologies—imperialism, nationalism, race, democracy—in so far as they influence political development in the colonies, and the report deals also with such essentially practical problems as the organisation of local government. The reader is left in no doubt as to the great difficulties that need to be overcome, but the first stage in their solution is a proper appreciation of their origin and extent. The merit of this modest volume is that it serves this primary but very important function.

The Construction of Deeds and Statutes. Third edition. By Sir Charles E. Odgers, m.a., b.c.l., of the Middle Temple, Barrister-at-Law, late Puisne Judge of the High Court of Judicature at Madras. London: Sweet & Maxwell, Ltd. 1952. xxvi and 331 and (index) 20 pp. (30s. net.)—This is a difficult subject for a student for it cuts across so many branches of the law, and difficult also for an author to fix the limits and resist expansion. The learned editor of *Craies* is eminently qualified for the task and has produced the leading students' textbook. The main changes in the new edition are a section on Rectification of Documents, pp. 54–56; the former Section X—Rules and Orders has, in view of the Statutory Instruments Act, 1946, been entirely rewritten under the heading Delegated Legislation, and over 200 cases have been added. The reference at p. 49 to *British Movietonews* v. *London &*

District Cinemas, Ltd. [1952] A.C. 166, illustrates the conflicting views that may arise on the application of rules of construction. Small slips occur at p. 21—the implied contract is to remedy the vendor (not purchaser)—and on p. 122 on the requirement of consideration by a tenant for life on a disposition of his *life* interest. At pp. 172–174 on the meaning of children the important provisions of the Adoption Act, 1950, s. 13, have been overlooked.

Cockle's Cases and Statutes on Evidence. Eighth edition. By Lewis Frederick Sturge, of the Inner and Middle Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1952. lvii and 527 and (index) 18 pp. (35s. net.)—This follows the general arrangement of the previous edition, seven new statutes are incorporated and several new cases have been added. The chapter on Presumptions, admittedly a difficult topic, has been improved by rewriting, but at p. 23 it is still stated that a child under seven is incapable of a crime despite the cross-reference to p. 477, section 50 of the Children and Young Persons Act, 1933 " . . . no child under the age of eight years can be guilty of any offence." The provisions of the Treason Act, 1945, s. 2, have been overlooked at pp. 149 and 396, proof by two witnesses is no longer required in treason. The important *Constantine Case* [1942] A.C. 154 has been added on the burden of proof. Perhaps on other topics a few more recent cases could be added with profit, particularly in connection with estoppel.

Pollock on the Law of Partnership. Fifteenth edition. By L. C. B. Gower, ll.m., Solicitor, Sir Ernest Cassel Professor of Commercial Law in the University of London. London: Stevens & Sons, Ltd. 1952. xxxv and 246 and (index) 26 pp. (25s. net). —The editor has rightly resisted the temptation of regarding the original text as sacrosanct and with commendable restraint and discrimination has produced an up-to-date text without altering Pollock's words more than was reasonably necessary, save for the deletion of the dead wood and the addition of new material. The main changes have been in connection with section 14 (holding out); section 36 (rights of third persons dealing with the firm against apparent members), which are revised in the light of *Tower Cabinet Co.* v. *Ingram* [1949] 2 K.B. 397; section 39 (goodwill); section 44 (distribution of assets); and the chapter on administration of insolvent estates. The Limited Partnership Rules and Forms are replaced as appendices by the Business Names Act, 1916 (as amended) and the Rules with useful notes. The fourth appendix contains notes on the drafting of medical partnership agreements. The transfusion operation has been well performed and the old classic is assured a long life.

Odger's Principles of Pleading and Practice, in Civil Actions in the High Court of Justice. Fourteenth edition. By Lewis Frederick Sturge, of the Inner and Middle Temple, and the Midland Circuit, Barrister-at-Law. London: Stevens & Sons, Ltd. 1952. liv and 455 and (index) 20 pp. (35s. net.)—Two new chapters on Chancery Procedure by Mr. Raymond Walton are the new feature in this leading textbook for Bar students. Although it is a clear introduction to the subject, it is suggested that it could be made still more useful by bringing together certain topics which are somewhat scattered, such as costs, appeals, taking of accounts and special endorsements. The Crown Proceedings Act, 1947, is dealt with briefly at p. 15. It should be noted that the Arbitration Acts, 1889 to 1934, are now consolidated in the Arbitration Act, 1950. *Young* v. *Rank* [1950] 2 K.B. 510 (submission of no case to answer) might be added at pp. 272 and 285.

Chalmers on Bills of Exchange. A Digest of the Law of Bills of Exchange, Promissory Notes, Cheques and Negotiable Securities. Twelfth edition. By Barry Chedlow, of the Middle Temple and Midland Circuit, Barrister-at-Law. London: Stevens and Sons, Ltd. 1952. xliii and 353 and (index) 36 pp. (£2 10s. net.)—The main changes are the addition of some 30 new cases since the 1947 edition; section 33 of the Exchange Control Act, 1947; sections 33 and 108 of the Companies Act, 1948 (both annotated); a comparative table of sections of the English Act and the American Negotiable Instruments Law; and the editions of the reference books mentioned in the footnotes have been brought up to date. The format of the book has been improved by inserting section numbers at the head of each page, much of the text has been rearranged, many illustrations have been added and out-of-date matter omitted. The book is primarily for practitioners, and this edition has improved the efficiency and utility of this standard work.

Learning the Law. Fourth edition. By Glanville L. Williams, ll.d., Quain Professor of Jurisprudence in the University of London, of the Middle Temple, Barrister-at-Law. London: Stevens & Sons, Ltd. 1953. xiv and 210 pp. (12s. 6d. net.)—This book has been referred to as the "law student's *vade mecum*; his guide, philosopher and friend," and it richly deserves this commendation. The new edition incorporates friendly suggestions which make it still more useful, and the references to sources and literature have been revised and brought up to date.

The Lawyer's Companion and Diary for 1953. Part I. By Ernest L. Buck; Part II. By Leslie C. E. Turner. London: Stevens & Sons, Ltd.; Shaw & Sons Ltd. xxii and 1519 pp. (22s. plus 5s. 6d. Purchase Tax.)—This is now in its hundred and seventh

year of publication and contains a useful account of costs and fees, duties and taxes, practice notes, miscellaneous information, a law list, and a diary of a page per day for engagements at half-hourly intervals starting at 9 a.m. and ending at 6 p.m.

Summary Maintenance and Guardianship Orders. By a Magistrates' Clerk. London: Solicitors' Law Stationery Society. 1952. 71 pp. (8s. 6d.)—This is number 30 of the *Oyez Practice Notes*, and it gives a clear and accurate account of the current law under the Separation and Maintenance Acts and the Guardianship of Infants Acts. An increasingly important part of this subject is the position when parties are in Scotland or Northern Ireland or in territories with which we have reciprocal arrangements or in the Services, and a third of the book is devoted to those matters. This series is written for busy practitioners, and this number well maintains the standard that is expected of these publications.

Conflict of Laws in a Nutshell. By Fenton S. Bresler, ll.b. (hons) lond., of the Middle Temple and South-Eastern Circuit, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1953. xii and 66 pp. (6s. 6d. net.)—Though based on T. A. Blanco White's edition of 1947 it is practically a new book, and good use has been made of *Dicey* and *Cheshire*.

The Law of Contracts in a Nutshell with Epitomes of Leading Cases. Sixth edition. By Alan Garfitt, ll.b., of Lincoln's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1952. xii and 105 and (index) 10 pp. (6s. 6d. net.)

Oyez Practice Notes. No. 9. Proving a Will. Second edition. By D. R. Le B. Holloway, ll.b., of the Principal Probate Registry. London: The Solicitors' Law Stationery Society, Ltd. 1952. iv and 94 and 16 pp. (9s. 6d. net.)

Stephen's Commentaries on the Laws of England. Third annual cumulative Supplement to the twenty-first edition. By L. Crispin Warmington, Solicitor of the Supreme Court (Honours). London: Butterworth & Co. (Publishers) Ltd. 1952. 37 pp. (5s. net.; Main Work and Supplement £6 15s. net.)—This brings the main work into conformity with the laws existing on January 1, 1952.

The Howard Journal. Vol. VIII. No. 3. 1952.—A review of modern methods for the prevention and treatment of crime and juvenile delinquency. London: Howard League for Penal Reform. 95 pp. (2s. 6d. net.)

Detention in Remand Homes. A Report of the Cambridge Department of Criminal Science on the use of Section 54 of the

Children and Young Persons Act, 1933. Preface by L. Radzinowicz, ll.d. Edited for the Department of Criminal Science, Faculty of Law, University of Cambridge, by L. Radzinowicz and J. W. C. Turner. London: MacMillan & Co., Ltd. 1952. x and 92 pp. (12s. 6d. net.)

The Young Delinquent in his Social Setting. A Glasgow Study. By T. Ferguson, Professor of Public Health and Social Medicine, University of Glasgow. Published for the Nuffield Foundation by Geoffrey Cumberlege. Oxford University Press. 1952. xii and 152 and (index) 6 pp. (10s. 6d. net.)

An Introduction to the History and Records of the Court of Wards and Liveries. Cambridge Studies in Legal History. By H. E. Bell, Fellow of New College, Oxford. Cambridge: University Press. 1953. x and 205 and (index) 9 pp. (30s. net.)

Baron David Hume's Lectures. 1786–1822. Vol. III. Edited and annotated by G. Campbell H. Paton, m.a., ll.b., Advocate and Lecturer in the History of Scots Law in the University of Glasgow. Edinburgh: Printed for the Stair Society by T. and A. Constable, Ltd. 1952. l and 420 pp.

The Papers of Thomas Jefferson. Vol. 5. February, 1781 to May, 1781. Julian P. Boyd, Editor. Lyman H. Butterfield and Mina R. Bryan, Associate Editors. Princeton University Press. London: Geoffrey Cumberlege. 1952. xxxv and 705 pp. (80s. net.)

Law of Municipal Contracts with Annotated Model Forms. By Charles S. Rhyne of the District of Columbia Bar. Washington 6 D.C. National Institute of Municipal Law Officers. 1952. 175 and (index) 16 pp. ($7.50 net.)

Fluoridation of Municipal Water Supply. A review of the scientific and legal aspects. By Charles S. Rhyne and Eugene F. Mullin, jr. Report No. 140. 1952. Washington 6 D.C. National Institute of Municipal Law Officers. 62 pp. ($3.00 net.)

Natural Law Institute Proceedings. Vol. 5. Edited by Edward F. Barrett, Professor of Law. University of Notre Dame Press. Indiana. 1953. 179 pp. ($2.00 net.)

Civil Procedure of the Trial Court in Historical Perspective. Judicial Administration Series. By Robert Wyness Millar, Emeritus Professor of Law in Northwestern University. Published by The Law Center of New York University for the National Conference of Judicial Councils. 1952. xvi and 515 and (index) 16 pp. (No price given.)

Bulletin de Droit des Gens. Edited by the Belgian Ministère des Affaires Etrangères et du Commerce Extérieur, Service de Legislation Etrangère Brussels: Avenue des Arts, 25. 1952.—This roneographed collection of international instruments is intended to supplement the same Ministry's "Documentation Juridique Etrangère" which covers the sphere of domestic law. In the first issue the main European treaties concluded since 1944 which affect Belgium are reproduced. In subsequent issues it is proposed to include a survey of decisions touching upon points of international law.—K. L.

Hayes and Jarman's Concise Forms of Wills. Eighteenth edition. By Kenneth Warnell Rubin, ll.b., of Gray's Inn, Barrister-at-Law. London: Sweet & Maxwell, Ltd. 1952. xc and 321 and (index) 10 pp. (£3 10s. net.) Also First Supplement (to November 30, 1952). 36 pp. (No charge.)—The Supplement summarises the Intestates' Estates Act, 1952, and contains a fully annotated copy of the Act.

Current Law Year Book, 1951. General Editor: John Burke; Year Book Editor: Clifford Walsh, ll.m. London: Sweet & Maxwell, Ltd., Stevens & Sons, Ltd. 1952. cl. and 434 and (cumulative index 1947–1951) 42 pp. (£2 10s. net.)

Leading Cases on the Law of Banking. By Lord Chorley, m.a., of the Inner Temple, Barrister-at-Law, formerly Sir Ernest Cassel Professor of Commercial Law in the University of London, and P. E. Smart, ll.b., a.i.b. London: Sir Isaac Pitman & Sons, Ltd. 1953. xxx and 324 and (index) 5 pp. (30s. net.)—This casebook is written primarily for candidates for the Diploma Examination of the Institute of Bankers, and the general plan of the subject-matter follows Lord Chorley's admirable book on the Law of Banking. The method used is to give a sufficient summary of the facts, the decision with appropriate short extracts from the judgments, followed by a Note drawing attention to other relevant cases, to passages in textbooks or articles and such other material as may be helpful to the student.

Butterworths Costs. First Supplement. Edited by B. P. Treagus, Principal Clerk, Supreme Court Taxing Office, and H. J. C. Rainbird, of the Supreme Court Taxing Office, Royal Courts of Justice. Including a Section on Quarter Sessions. By Alfred Swift, Deputy Clerk of the Peace, County of London Quarter Sessions. London: Butterworth & Co. (Publishers), Ltd. 1952. xv and 129 pp. Main Volume with Supplement. (£7 10s. net.) Supplement alone (12s. 6d. net.)

The Babylonian Laws. Edited with Translation and Commentary by G. R. Driver, m.a., f.b.a., Fellow of Magdalen College, and Professor of Semitic Philology, Oxford, and John C. Miles, kt.,

M.A., B.C.L., Honorary Fellow of Merton and Exeter Colleges, Barrister-at-Law. Vol. I. Legal Commentary. Oxford: Clarendon Press. 1952. xxxi and 503 and (indexes) 14 pp. (50s. net.)

Historical Introduction to the Study of Roman Law. Second Edition. By H. F. JOLOWICZ, LL.D., D.C.L., of the Inner Temple, Barrister-at-Law, Regius Professor of Civil Law in the University of Oxford, Fellow of All Souls College. Cambridge: University Press. 1952. xxv and 584 and (index) 12 pp. (60s. net.)

Institutes of Gaius. Part II. Commentary. By FRANCIS DE ZULUETA, D.C.L. Honorary Fellow of Merton College. Oxford: Clarendon Press. 1953. xv and 302 and (index) 13 pp. (25s. net.)

The Theodosian Code and Novels and the Sirmondian Constitutions, a Translation with Commentary, Glossary and Bibliography. By CLYDE PHARR, in collaboration with THERESA SHERRER DAVIDSON and MARY BROWN PHARR, with an Introduction by C. DICKERMAN WILLIAMS. Princeton University Press. London: Geoffrey Cumberlege. 1952. xxvi and 572 and (glossary) 27 (bibliography) 3 and (index) 37 pp. (130s. net.)

The Law of Libel and Slander. By OSWALD S. HICKSON and P. F. CARTER-RUCK. London: Faber and Faber, Ltd. 1953. xiii and 286 and (index) 4 pp. (30s. net.)

Sir Frederick Pollock, BT. 1845–1937. By PROFESSOR H. D. HAZELTINE. From the Proceedings of the British Academy. Vol. 35. London: Geoffrey Cumberlege. 1952. 23 pp. (3s. net.)

Yearbook on Human Rights for 1950. United Nations. New York. London: H.M. Stationery Office. 1952. xvi and 542 and (indexes) 52 pp. (47s. 6d. net.)

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The Grotius Society. Transactions for the year 1951. Problems of Public and Private International Law. Vol. 37. London: The Grotius Society. 1952. xxiii and 184 and (index) 2 pp. (To Non-Members 25s. net.)

The British Year Book of International Law, 1951. Twenty-eighth year of issue. Edited by PROFESSOR H. LAUTERPACHT. Issued under the auspices of the Royal Institute of International Affairs. Geoffrey Cumberlege. Oxford University Press. 1952. viii and 439 and (index) 18 pp. (60s. net.)

International Conciliation. October, 1952. No. 484. Issues before the Seventh General Assembly. New York: Carnegie Endowment for International Peace. 126 pp.

Laws and Regulations on the Regime of the High Seas. United Nations Legislative Series. New York. 1952. London: H.M. Stationery Office. Vol I—Continental Shelf; Contiguous Zones; Supervision of Foreign Vessels on the High Seas. xviii and 305 pp. (25s. net.) Vol. II—Laws relating to Jurisdiction over Crimes Committed Abroad or on the High Seas. xi and 142 pp. (17s. 6d. net.)

The Commercial Dictionary. By A. G. P. PULLAN, of the Middle Temple, Barrister-at-Law, and D. W. ALCOCK, A.S.A.A., A.A.C.C.A. Adapted from the Australian Commercial Dictionary by R. KEITH YORSTON, B.COMM. London: Sweet & Maxwell, Ltd. 1953. v and 316 pp. (25s. net.)

Williams on the Law of Executors and Administrators. Thirteenth edition. By SIR DAVID HUGHES PARRY, M.A., LL.D., D.C.L., an Honorary Bencher of the Inner Temple, Professor of English Law, University of London, assisted by DONALD CHARLES POTTER, LL.B., of the Middle Temple and Lincoln's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd. 1953. Two Vols. ccxxxviii and 1219 and (index) 127 pp. (£8 8s. net.)

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No. 3. *Adoption of Children.* Third Edition. By J. F. JOSLING, Solicitor. 1953. 92 and (index) 8 pp. (10s. 6d. net.)

No. 31. *Legitimacy and Legitimation.* Revised Reprint. By A. L. POTEZ, B.A., of the Middle Temple, Barrister-at-law. 1952. 48 pp. (6s. 6d. net.)

No. 32. *Weaving's Notes on Bankruptcy and Practice and Procedure in County Courts,* Second edition. By THOMAS S. HUMPHREYS. 1953. 46 pp. (7s. 6d. net.)

The English Trial and Comparative Law. By C. J. HAMSON and T. F. T. PLUCKNETT. Cambridge: W. Heffer & Sons, Ltd. 1952. 48 pp. (2s. 6d. net.)

Executors and Administrators. Fifth edition by N. E. MUSTOE, M.A., LL.B., of Gray's Inn, Barrister-at-Law, with Executorship Accounts by J. J. WALSH, A.A.C.C.A., Lecturer in Executorship Accounts at the Kennington Commercial College. London: Butterworth & Co. (Publishers), Ltd. 1952. xliv and 279 and (index) 20 pp. (27s. 6d. net.)

Communications concerning articles and notes should be sent to Professor S. J. Bailey, St. John's College, Cambridge. Books for review should be sent to The Cambridge Law Journal, *Squire Law Library, Cambridge.*

It is regretted that the limited space available for book reviews has made it necessary to give no more than short notices of some of the works received for review.

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